RECORD AND BRIEFS

16-534
No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the original execution immunity provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.* (the "FSIA"), plaintiffs holding terrorism judgments against designated state sponsors of terrorism "faced practical and legal difficulties at the enforcement stage." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1317-18 (2016). "[O]nly foreign-state property located in the United States and 'used for a commercial activity' was available for the satisfaction of judgments." *Id.* at 1318. In 2008, Congress enacted 28 U.S.C. § 1610(g) to expand the availability of assets for postjudgment execution against the property of foreign state sponsors of terrorism, their agencies and instrumentalities. *Id.* at 1318 n.2.

The Seventh Circuit held below that section 1610(g) merely amends the existing attachment immunity provisions to enable terrorism judgment creditors to enforce their judgments against the foreign governments' instrumentalities that have been established as separate juridical entities. This holding conflicts with the Ninth Circuit's decision in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950 (9th Cir. 2016), which held that section 1610(g) provides a freestanding attachment immunity exception, which ***in addition to*** enabling veil piercing, allows terrorism victims

QUESTIONS PRESENTED – Continued

to attach and execute upon ***any*** assets of foreign state sponsors of terrorism, their agencies, or instrumentalities regardless of whether the assets are connected to commercial activity in the United States.[1]

The first question presented for review is:

Whether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether the assets are otherwise subject to execution under section 1610.

2. Section 1610(a) is another execution immunity provision of the FSIA. It enables execution upon "property in the United States of a foreign state . . . ***used for a commercial activity*** in the United States" under certain specified conditions enumerated in the statute. The statutory text refers to the commercial use without respect to any particular actor.

The second question presented for review is:

Whether the commercial use exception to execution immunity, codified at 28 U.S.C. § 1610(a), applies to a foreign sovereign's property located in the United States only when the property is used by the foreign state itself.

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[1] Iran has filed a petition for a writ of certiorari challenging the Ninth Circuit's *Bennett* decision based upon the conflict with the Seventh Circuit's decision below as to the construction of section 1610(g). See Supreme Court Case No. 16-334.

LIST OF PARTIES

The Petitioners were judgment creditors in the Northern District of Illinois seeking to enforce a judgment previously entered in the District Court for the District of Columbia. They were the appellants in the court of appeals.

Respondent, Islamic Republic of Iran, was the judgment debtor in the district court and the appellee in the court of appeals.

Respondents, Field Museum of Natural History and University of Chicago, Oriental Institute, were respondents to the judgment creditors' citations to discover assets in the district court, and appellees in the court of appeals.

The United States is not a party to this action. However it appeared in the district court to file statements of interest pursuant to 28 U.S.C. § 517, and in the court of appeals to file an *amicus* brief and present oral argument supporting the position of the appellees.

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JURISDICTION

The court of appeals issued its order and judgment on July 19, 2016. App. 1-38. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.* are set forth in the Appendix. App. 72-98.

STATEMENT OF THE CASE

I. Introduction.

This petition presents important questions of federal law pertaining to two separate executional immunity provisions of the Foreign Sovereign Immunities Act,

28 U.S.C. §§ 1602, *et seq.* (the "FSIA"). Both questions present pure questions of law. And, both pertain to the range of assets of a foreign state that are subject to attachment and execution by judgment creditors of the foreign state.

1. 28 U.S.C. § 1610(g) is a remedial provision designed to expand the availability of assets for postjudgment execution against the property of foreign state sponsors of terrorism, their agencies and instrumentalities. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016). In *Bennett v. Islamic Republic of Iran*, 825 F.3d 950 (9th Cir. 2016), the Ninth Circuit held that subsection (g) is a freestanding provision for attaching and executing against ***any*** assets of a foreign state or its agencies or instrumentalities, and is not dependent upon any other execution immunity provisions in section 1610.[2] In this case, the Seventh Circuit explicitly disagreed with the Ninth Circuit, holding that section 1610(g) "is not a freestanding terrorism exception to execution immunity." App. 7. The court held section 1610(g) does no more than enable judgment creditors of a designated state sponsor of

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[2] The Ninth Circuit issued three successive decisions in *Bennett*, each interpreting section 1610(g) as an independent execution immunity exception. The first opinion, written by Judge Kozinski, is reported at *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1284 (9th Cir. 2015) ("*Bennett I*"). Upon Iran's first motion for rehearing, the decision was withdrawn and superseded by second decision authored by Judge Graber. 817 F.3d 1131, (9th Cir. 2016) ("*Bennett II*"). Iran filed a second motion for rehearing. And, the Ninth Circuit entered its third and final decision in which it reaffirmed its prior construction of section 1610(g). 825 F.3d 950 (9th Cir. 2016) ("*Bennett III*").

terrorism to enforce their judgment against the state's agencies or instrumentalities without regard to whether the agency or instrumentality is juridically separate from the state. App. 34. The court further limited the applicability of subsection (g) by holding that it applies only where the judgment holders can satisfy one of section 1610's execution immunity exceptions that apply to foreign states. App. 35. Thus, the Seventh Circuit's decision in this case creates a broad and explicit conflict with the Ninth Circuit's decision in *Bennett*. App. 26. As Judge Hamilton wrote in his dissent from the denial of *en banc* review,[3] this conflict "has important practical consequences." App. 39. The Seventh Circuit's holding "shelters from execution a wide range of assets of state sponsors of terrorism" that the Ninth Circuit's decision renders subject to attachment and execution. App. 39-40. The Court should grant this petition to resolve the circuit conflict.

2. The Seventh Circuit also held that the commercial use exception to execution immunity codified at 28 U.S.C. § 1610(a) "applies only when the ***foreign state itself*** has used its property for a commercial activity in the United States." App. 20. (emphasis in original). This holding deviates from the statutory text,

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[3] Under Seventh Circuit Rule 40(e), because a majority of active judges on the Seventh Circuit were disqualified from participating in the consideration of this case, rehearing *en banc* was impossible. App. 35 n.6; App. 39. Judge Hamilton filed a dissenting opinion arguing that with *en banc* review procedurally precluded, the court erred in overruling circuit precedent and creating a circuit split. App. 39. Judge Hamilton also disagreed on the merits of the court's decision as to section 1610(g).

which indicates that any commercial use of the foreign sovereign's property suffices to defeat immunity. The Seventh Circuit ignored numerous decisions of this Court requiring courts to adhere to statutory text except where compelled by ambiguity or inconsistency to look for interpretive guidance elsewhere.

Even more troubling, the court ***misconstrued*** decisions of three other courts of appeal to artificially and unilaterally declare "an emerging consensus" aligned with the Seventh Circuit's own narrow, non-textual construction of subsection 1610(a). App. 16, 20. In fact, not one of the decisions cited among the purported "consensus" raised or addressed the question of "whose commercial use counts." If left un-reviewed by this Court, the Seventh Circuit's mistaken declaration of consensus on this important question will likely preempt any further consideration of this question. Under these circumstances, the important question of "whose commercial use counts" under the commercial use exception to foreign sovereign execution immunity should be settled by this Court.

II. The Statutory Framework

A. The Foreign Sovereign Immunities Act

1. Foreign sovereign immunity is, and always has been, "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). The FSIA replaced the prior common law-based immunity regime under

which courts regularly deferred to executive branch recommendations regarding immunity. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. ___, 134 S. Ct. 2250, 2255 (2014). Under the former immunity regime, "sovereign immunity decisions were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 188. "Congress abated the bedlam in 1976," replacing the old system with the Foreign Sovereign Immunities Act's comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state. *NML Capital, Ltd.*, 134 S. Ct. at 2255. The FSIA is codified at 28 U.S.C. § 1602, *et seq.*

2. The FSIA provides foreign states with two types of immunity. *NML Capital, Ltd.*, 134 S. Ct. at 2256. The first, jurisdictional immunity, shields foreign sovereigns from jurisdiction of United States courts. *Id.* The second form of immunity under the FSIA pertains to the enforcement of judgments, and protects foreign sovereigns from attachment and execution as provided in 28 U.S.C. §§ 1609-1611. This petition requests that the Court resolve important questions regarding the scope of two of the FSIA's executional immunity provisions.

3. The FSIA codified the "restrictive theory" of immunity, which, as its name suggests, restricted or limited the broad immunity previously extended to foreign sovereigns. *Verlinden*, 461 U.S. at 486. Under the restrictive theory, foreign states enjoy immunity when

they engage in activities "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Conversely, it does not immunize "a foreign state's participation in the marketplace in the manner of a private citizen or corporation." *Id.* Nonetheless, even under the restrictive theory, as codified in the FSIA, foreign sovereigns are presumed to be immune from jurisdiction of United States courts, and from attachment, arrest and execution, unless a statutory exception provides otherwise. *See* 28 U.S.C. §§ 1604, 1609.

Applying the restrictive theory of immunity, the Court has repeatedly insisted that lower courts refrain from expanding foreign sovereign immunity beyond that conferred by statute. Thus, in *Weltover*, the Court held that the government of Argentina was subject to jurisdiction in New York when Argentina defaulted on certain government bonds that were payable in New York. 504 U.S. at 609-10. The Court relied on the text of the FSIA when it refused to expand the scope of jurisdictional immunity relating to a foreign state's commercial activity. The Court found that the argument for immunity was "squarely foreclosed by the language of the FSIA." 504 U.S. at 616. "The question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Id.* at 518.

In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003) the Court again refused to expand upon the text of the FSIA to extend immunity to subsidiaries of an instrumentality of a foreign state. The Court held, "***The text*** of the FSIA gives no indication that Congress

intended us to depart from the general rules regarding corporate formalities." *Id.* at 476 (*emphasis supplied*). The following year, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Court held that the rules judges should apply in resolving sovereign immunity claims could only be derived from the text and structure of the FSIA. 541 U.S. at 699. In a concurring opinion, Justice Breyer emphasized that "the literal language of the statute supports [the plaintiff]." 541 U.S. at 708. Justice Breyer refused to "read into § 1605(a)(3) qualifying language not contained in the statute." *Id.*

In *Samantar v. Yousef*, 560 U.S. 305 (2010), the lower courts expanded the statutory definition of "foreign state" to include individual officials of foreign states. Looking primarily to the text of the statute, the Court reversed. It held: " . . . Congress did not mean to cover other types of defendants never mentioned in the text." *Id.* at 319. Separate concurring opinions emphasized that the decision should have been limited to the textual analysis, which clearly indicated that individual officials were not included in the statutory definition and would not enjoy immunity. *Id.* at 326. Most recently, in *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. ___, 134 S. Ct. 2250, 2256 (2014), the Court reaffirmed that foreign states enjoy only that immunity conferred by "the text of the Act." Because the text of the FSIA is silent as to immunity limiting discovery in aid of execution of a judgment, the Court refused to

recognize any such immunity. *Id.* "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.").

B. Section 1610(a) – The Commercial Use Exception To Execution Immunity.

28 U.S.C. § 1610(a), provides an exception to execution immunity for property of a foreign state when the property is used for commercial activity in the United States. The opening paragraph provides in part, "The property in the United States of a foreign state . . . ***used for a commercial activity*** in the United States, shall not be immune from attachment in aid of execution, or from execution. . . ." *Id.* (*emphasis supplied*). Section 1610(a) allows execution where one of seven enumerated conditions has been satisfied. 28 U.S.C. § 1610(a)(1)-(7). One of these conditions is that the judgment to be enforced relates to a claim for terrorism under 28 U.S.C. § 1605A, which is the terrorism exception to jurisdictional immunity. 28 U.S.C. § 1610(a)(7). The statute does not specify that the foreign sovereign itself must use the property for commercial activity; it merely specifies that the property must be so used. The question this petition raises under section 1610(a) is, as the court of appeals put it, "whose commercial use counts?" App.16. This is an important question that applies to enforcement of judgments against any foreign state, even those that are not designated state sponsors of terrorism. *See* § 1610(a)(1)-(6).

C. Section 1610(g) Was Enacted To Expand The Range Of Assets Available To Satisfy Terrorism Judgments.

Under the original attachment immunity provisions of the FSIA, 28 U.S.C. §§ 1609-1611, most terror victim plaintiffs who successfully obtained judgments against designated state sponsors of terrorism were subsequently drawn into what one judge described as "a long, bitter, and often futile quest for justice." *In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d 31, 45-46 (D.D.C. 2009); *cf., Bank Markazi v. Peterson*, 136 S. Ct. at 1317-18 (2016). As the Ninth Circuit observed in its first decisions in *Bennett*:

> For years, the state-sponsored terrorism exception to the FSIA created an anomaly – it abrogated a foreign sovereign's immunity from judgment, but not its immunity from collection. Terrorism victims therefore had a right without a meaningful remedy.

Bennett I, 799 F.3d at 1284.

Two principal obstacles prevented terror victim judgment creditors from enforcing their judgments against Iran and other state sponsors of terrorism. The first obstacle was that "only foreign-state property located in the United States and 'used for a commercial activity' was available for the satisfaction of judgments." *Bank Markazi*, 136 S. Ct. at 1318; *In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d at 52-53. Due to the lack of formal relations between the United States and state sponsors of terrorism, these

states owned very little property in the United States that satisfied the commercial use requirements. *See In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d at 53.

The second principal obstacle to enforcement of terror judgments against state sponsors of terrorism was that almost any Iranian assets that could be found in the United States had been blocked under various regulations and executive orders, and were in the control and possession of the United States government. *Id.* at 52. Thus, the sovereign immunity of our own federal government along with "a dizzying array of statutory and regulatory authorities" to which the blocked assets were subjected prevented judgment creditors from enforcing their judgments against these assets. *Id.* at 52-53.

Terrorism plaintiffs began targeting property in which Iran-owned entities held an interest. *Estate of Heisler v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 14 (D.D.C. 2011). This tactic, however, led the plaintiffs into a third obstacle to enforcement of their judgments, specifically, the application of this Court's decision in *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). *See Estate of Heisler*, 807 F. Supp. 2d at 14. *Bancec* stands for the proposition that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626-27. Thus as a rule, governmental corporations or other entities cannot be held liable for the debts of their foreign sovereign owners. *Id.* The

Bancec rule, like the limitation on execution against blocked assets or non-commercial assets often frustrated terror victim judgment holders' enforcement efforts. *See Estate of Heisler*, 807 F. Supp. 2d at 14.

Congress intervened to provide relief for terrorism victims holding judgments that were essentially unenforceable. *Bank Markazi*, 136 S. Ct. at 1318. One attempt to assist terrorism victims, was the enactment of the Terrorism Risk Insurance Act of 2002 (the "TRIA"), which allows terror victims to execute their judgments against the blocked assets of terrorist parties as well as those of the terrorist parties' agencies or instrumentalities. *Id.* However, as Judge Lamberth observed, "[i]n the case of Iran, . . . very few blocked assets exist." *In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d at 58. Thus, TRIA offered limited relief to Iran's terrorism judgment creditors.

In 2008, Congress again legislated to help terrorism victims enforce their judgments. Congress amended the FSIA by, among other things, adding section 1610(g). The purpose of section 1610(g) was to expand the availability of assets for postjudgment execution against the property of foreign state sponsors of terrorism and their agencies and instrumentalities. *Bank Markazi*, 136 U.S. at 1318 n.2. Courts have recognized the "broad remedial purposes" of section 1610(g), and agreed that "a core purpose of [section 1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heisler*, 807 F. Supp. 2d at 26 (*emphasis supplied*). The

question here is, to what extent section 1610(g) "significantly expands" the range of assets available to enforce terrorism judgments.

Section 1610(g)(1) provides:

> (1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

By all accounts, section 1610(g) abrogates *Bancec*, and at a minimum, enables terrorism judgments entered against a foreign state to be enforced against that state's juridically independent agencies or instrumentalities. App. 26. *Bennett III*, 825 F.3d at 958-59. However, the court below held that section 1610(g) accomplishes nothing more. In stark contrast, the Ninth Circuit held that in addition to abrogating *Bancec*, subsection (g) establishes an independent "terrorism" exception to execution immunity that allows attachment of all property of state sponsors of terrorism regardless of whether the property satisfies some other execution immunity provision. *Bennett III*, 825 F.3d at 960; App. 26. Despite the near-absolute range of assets subject to execution under *Bennett*, courts recognize, that unlike the TRIA, section 1610(g) "does not take precedence over 'any other provision of law.'" *Bank Markazi*, 136 S. Ct. 1318 n.2. Thus, for example, the FSIA's central bank immunity provision would trump section 1610(g). *Id.* Similarly, diplomatic property remains immune. *Wyatt v. Syrian Arab Republic*, 2015 U.S. Dist. LEXIS 46525 (D.D.C. 2015) ("property exempt from attachment under the [Vienna Convention on Consular Relations] is also exempt under the FSIA, regardless of how it would be treated under sections 1610 and 1611.").

III. Jurisdiction Of The Lower Courts.

The petitioners registered their Judgment for enforcement purposes in the United States District Court for the Northern District of Illinois pursuant to 28

U.S.C. § 1963. Thus, the district court below had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1330 and 1331.

The Northern District of Illinois entered its memorandum opinion and judgment on March 27, 2014. The petitioners filed their notice of appeal on April 25, 2014. The United States Court of Appeals for the Seventh Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291.

IV. Proceedings Below.

A. The Judgment.

Petitioners, United States nationals, initiated this post-judgment collection action in an attempt to enforce a money judgment entered against Iran for its sponsorship of a suicide bombing attack on a crowded pedestrian mall in Jerusalem, Israel, on September 4, 1997. *See Campuzano/Rubin*, 281 F. Supp. 2d 258 (D.D.C. 2003). Following a four-day trial, on September 10, 2003, the court entered judgment (the "Judgment") in favor of the petitioners, awarding them $71.5 million in compensatory damages against Iran.

B. The Enforcement Proceedings In The District Court For The Northern District Of Illinois.

The petitioners registered the Judgment in the United States District Court for the Northern District of Illinois on December 29, 2003. The petitioners

initiated enforcement proceedings against certain Persian artifacts (the "Artifacts") that were in the possession and use of respondents, the Oriental Institute of the University of Chicago (the "University") and the Field Museum of Natural History (the "Field Museum") (together, "the Museums"). The petitioners argued that they were authorized to enforce the Judgment against the Artifacts under the Commercial Activity Exception, 28 U.S.C. § 1610(a). The Artifacts were used for "commercial activity," as the Court defined that term in *Weltover*, 504 U.S. at 614 – referring to the "nature" of the activity, rather than its "purpose." Petitioners also claimed the Artifacts were subject to execution under the Terrorism Exception, 28 U.S.C. § 1610(g). Iran and the Museums moved for summary judgment arguing that neither of these provisions allowed execution against the Artifacts.

1. The petitioners asserted that section 1610(a) allowed them to attach and execute upon the artifacts because the artifacts satisfied all of the requirements for enforcement under section 1610(a): The Artifacts were property in the United States, belonging to Iran, and were being used by the Museums for commercial activity in the United States. The district court acknowledged that "Section 1610 does not explicitly restrict the commercial activity exception to activity conducted solely by the sovereign." App. 51.

The petitioners also explained that elsewhere in the FSIA, where Congress intended to restrict an immunity provision to activity of the foreign state, itself, Congress did so explicitly. Subsection 1605(a)(2), which

provides an exception to jurisdictional immunity, states clearly that no immunities lie where "the action is based upon a commercial activity carried on in the United States by the foreign state. . . ." Petitioners argued that had Congress intended to limit section 1610(a) to property used by the foreign state, itself, Congress would have said so explicitly, as it did in section 1605. The district court found these arguments inconclusive. The court relied upon the FSIA's statement of purpose, codified at 28 U.S.C. § 1602 and general statements regarding the legislative history of the FSIA to impart meaning to section 1610(a). App. 52-54. Specifically, the district court found determinative a reference in section 1602 indicating that a foreign state's "commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." App. 53. The district court concluded that section 1610(a) applies only where the foreign sovereign itself uses the property for commercial activity within the United States.

2. Section 1610(g) refers to the "property of a foreign state." Unlike other provisions within section 1610, subsection (g) includes no restrictions based upon commercial use or activity. The district court however held that section 1610(g) applies only to attachment of and execution upon property that has otherwise lost its immunity. App. 61-62. The court found that construing section 1610(g) to allow attachment of ***all*** property of a state sponsor of terrorism would render superfluous subsections (a)(7) and (b)(3), both of

which allow attachment of commercial property pursuant to terrorism judgments. App. 60-61.

As urged by the United States, which had filed a statement of interest under 28 U.S.C. § 517, the district court held that the words "as provided in this section," located at the end of the opening paragraph of subsection (g)(1) were intended to limit the applicability of subsection (g) to execution against property that was otherwise excepted from immunity in section 1610. App. 61-62. Thus, the district court also held that section 1610(g) does not provide any new basis for attaching assets of foreign states. App. 62. It accepted the respondents' argument that section 1610(g) merely enables terrorism victim judgment creditors of foreign sovereigns to "pierce the corporate veil" and enforce their judgments against the agencies and instrumentalities of the foreign sovereigns. App. 62. The district court granted Iran's and the Museums' motions for summary judgment. App. 71.

C. The Seventh Circuit Affirms The Judgment Against The Petitioners.

1. The Seventh Circuit affirmed the judgment entered against the petitioners. App. 1-38. The court of appeals rejected petitioners' section 1610(a) argument that property of a foreign sovereign used for a commercial activity in the United States is subject to attachment regardless of who uses the property. App. 17. The court of appeals found that "the passive-voice phrasing of § 1610(a) creates uncertainty about whose

commercial use suffices to forfeit a foreign state's execution immunity." App. 18. Additionally, the court asserted that allowing execution based upon a third party's commercial use of the foreign state's property would result in execution immunity applying in situations where jurisdictional immunity does not. App. 19-20. This, the court held, would violate the "settled principle that the exceptions to execution immunity are narrower than, and independent from, the exceptions to jurisdictional immunity." App. 20.

The Seventh Circuit asserted that it was joining an "emerging consensus" of three other courts of appeal that held that only use of property by the foreign state, itself, would trigger the execution immunity exception of section 1610(a). App. 16-17, *citing*, *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002); *Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1090-91 (9th Cir. 2007). However, the petitioners had demonstrated that ***none*** of these cases either involved execution upon property of a foreign state used for commercial activity by a third party. Notably, the district court did not cite any of these decisions as authority for the proposition that only use of property by the foreign state could permit execution.

2. The Seventh Circuit also affirmed the district court's holding that section 1610(g) does not create a new immunity exception to facilitate enforcement of terrorism judgments. App. 35. The court seized upon

the "as provided in this section" language that the district court relied upon, and held that it specifically requires judgment creditors to satisfy some other provision of section 1610 before they may execute upon property of a state sponsor of terrorism. App. 27. The court also adopted the district court's understanding that construing section 1610(g) to create an independent immunity exception would render other provisions superfluous. App. 27-28.

The Seventh Circuit expressly rejected the Ninth Circuit's holding that section 1610(g) is an independent exception to execution immunity intended to allow terrorism victims to execute upon any of a defendant sovereign's United States assets. App. 32-35. Instead, the Seventh Circuit held that the only effect of section 1610(g) is to eliminate the *Bancec* barrier to enforcement of judgments by allowing terrorism victims to pursue assets of juridically independent agencies or instrumentalities of state sponsors of terrorism. App. 26, 35.

3. Seventh Circuit Rule 40(e) creates a mechanism for the court to *sua sponte* circulate an opinion for *en banc* consideration when the decision either creates a circuit split or overrules circuit precedent. *See* App. 35 n.6; App. 39. Below, in addition to creating the circuit split with the Ninth Circuit, the panel overruled two of the Seventh Circuit's own precedents, both of which had interpreted section 1610(g) as being an independent immunity exception. App. 34-35, *citing Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014); *see also Wyatt v. Syrian Arab Republic*, 800

F.3d 331 (7th Cir. 2015). Thus, the court's decision required circulation for consideration of *en banc* review under both prongs of Circuit Rule 40(e). However, because a majority of the active judges had been disqualified from hearing the case, it was impossible to garner the votes of a majority to rehear the case *en banc*. App. 36 n.6; App. 39. Without the possibility of rehearing *en banc*, the three-judge panel proceeded to enter its judgment. App. 36 n.6.

Judge Hamilton, who was not on the panel below but had authored the two decisions the court overruled, dissented from the denial of *en banc* review. App. 39. While reluctantly conceding that the panel had "the power to overrule circuit precedent and to create a circuit split," Judge Hamilton asserted that it was "a mistake" to do so. App. 39. His objection was based both upon the principle of *stare decisis* and on the merits. App. 39.

As to the merits, Judge Hamilton refrained from engaging in the textual arguments, which "are laid out in *Bennett* and *Rubin*." App. 41. However, because he concluded that section 1610(g) is ambiguous, Judge Hamilton cited *Bennett*'s finding that "the legislative history of 2008 amendments shows broad intent to facilitate execution of judgments against any property owned by state sponsors of terrorism." App. 41; *quoting Bennett*, 825 F.3d 961-62. Judge Hamilton concluded:

> We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also underserving beneficiaries

of the unusual steps taken by the *Rubin* panel.

App. 42.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Decision Construing Section 1610(g) Warrants Review.

A. The Seventh Circuit Has Entered A Decision That Creates An Express And Broad Circuit Conflict On The Construction Of Section 1610(g).

The Seventh Circuit directly and explicitly disagreed with the Ninth Circuit's interpretation of section 1610(g). The Ninth Circuit held that section 1610(g) is an independent execution immunity exception that allows enforcement of judgments against any property of the foreign state, its agencies, and instrumentalities. *Bennett III*, 825 F.3d at 959. The Seventh Circuit held that section 1610(g) not an immunity exception at all, but merely a provision that enables plaintiffs to pierce the corporate veil of state-owned agencies and instrumentalities. App. 4. The court held that enforcement of judgments under section 1610(g) is available only against property that is otherwise subject to execution under section 1610. App. 35. Thus, *Rubin* limits section 1610(g) execution to commercial property only. *Bennett* does not require that the property have any nexus to commercial use or activity. *Bennett III*, 825 F.3d at 959-60. The gap between these conflicting

interpretations of section 1610(g) is vast, and should be resolved now.

The proper construction of section 1610(g) was thoroughly considered in both courts, and its determination was case-dispositive in the Seventh Circuit. The Ninth Circuit issued three decisions on the question, eliciting a dissenting opinion in two of them. The Seventh Circuit's ruling overturned two of that court's own precedents, leading Judge Hamilton to dissent from the court's denial of rehearing *en banc*.

Following its dramatic turnabout ruling in *Rubin*, the Seventh Circuit is now alone in its extremely narrow construction of the section 1610(g). The Ninth Circuit, however, was recently joined by the District of Columbia and Second Circuits both of which held that section 1610(g) permits execution upon *all* property of foreign state sponsors of terrorism. *See Weinstein v. Islamic Republic of Iran*, __ F.3d __, 2016 WL 4087940, *8 (D.C. Cir. 2016) (section 1610(g) strips execution immunity from ***all*** property of a defendant sovereign.) (*emphasis in original*); *Kirschenbaum v. 650 Fifth Avenue*, 830 F.3d 107, 123 (2d Cir. 2016) (*same*). The Executive Branch supports the Seventh Circuit's *Rubin* decision, filing briefs in support of Iran's position in both *Rubin* and *Bennett*. The issue is ripe for Supreme Court review.

B. Establishing The Correct Meaning Of § 1610(g) Is Important.

Establishing the correct meaning of section 1610(g) is important. Before Congress intervened on behalf of terrorism victims, these plaintiffs faced difficulties trying to enforce their judgments against Iran. *See Bank Markazi*, 136 S. Ct. at 1317-18; *supra Part* II.C. The only property available for the satisfaction of judgments was foreign state property located in the United States, and "used for a commercial activity" – property that was subject to attachment under section 1610(a)(7). *Bank Markazi*, 136 S. Ct. at 1318. Note that the *Rubin* holding requires that terrorism plaintiffs remain limited to recovery only from property used for commercial activity (except, possibly, as provided in the TRIA which pertains only to blocked assets. *See* 28 U.S.C. § 1610, *note*).

Section 1610(g) was specifically intended to remove the remaining obstacles to terrorism judgment enforcement. *See Bank Markazi*, 136 S. Ct. 1318 n.2. The Ninth Circuit quoted a House Conference Report stating that the new law would subject to execution "any property in which the foreign state has a beneficial ownership." *Bennett III*, 825 F.3d at 962, *quoting* H.R. Rep. No. 11-447, at 1001 (2007) (Conf. Rep.). And, it quoted one of the sponsors of the bill that became § 1610(g) as saying foreign state defendants are subject to attachment based upon "the satisfaction of a simple ownership test." *See id., quoting* 154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg). Other courts agree. "[A] core purpose of [section

1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related judgments under the FSIA." *Estate of Heisler*, 807 F. Supp. 2d at 26; *see also, Weinstein v. Islamic Republic of Iran*, ___ F.3d ___, 2016 WL 4087940, *8 (D.C. Cir. 2016).

This "core purpose" can only be satisfied if section 1610(g) is correctly understood and uniformly applied. As Judge Hamilton wrote in his dissent from the denial of *en banc* review, the Seventh Circuit's erroneous and narrow construction of section 1610(g) "has important practical consequences." App. 39. Most important, the *Rubin* panel's reading of section 1610(g) restricts rather than expands the availability of assets for postjudgment execution. App. 39. Thus, the Seventh Circuit would return plaintiffs to the "long, bitter, and often futile quest for justice" that plagued them before Congress enacted 1610(g). *See In re Islamic Republic of Iran Terrorism Litig*, 659 F. Supp. 2d 31, 45-46 (D.D.C. 2009); *supra* Part II.C.

C. The Seventh Circuit's Construction Of Section 1610(g) Is Wrong.

Rubin is an aberration among the decisions addressing the meaning and scope of section 1610(g). A review of the statutory text reveals why no other courts of appeals agree with the Seventh Circuit's latest pronouncement on this provision.

The opening clause of section 1610(g)(1) provides:

> (1) In general. Subject to paragraph (3), ***the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state***, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment ***as provided in this section***, regardless of [the five *Bancec* factors].

(*emphasis supplied*).

The Seventh Circuit's holding is based entirely upon five words in the statute: "as provided in this section." App. 26-35. The Seventh Circuit held that those five words can only be understood to incorporate every other provision of section 1610 into subsection 1610(g). App. 27. Accordingly, the court held that section 1610(g) requires terrorism plaintiffs to satisfy some other provision of section 1610 that allows execution. The Ninth Circuit explained that the phrase, "as provided in this section," refers to procedures contained in section 1610(f). *Bennett III*, 825 at 959. The Seventh Circuit rejected this interpretation as "highly strained." App. 33. However, the Seventh Circuit's decision fails to account for numerous textual elements that render its own construction not only strained, but unintelligible.

Assume that the Seventh Circuit correctly held that section 1610(g) merely "removes the *Bancec* barrier," which requires FSIA plaintiffs to overcome the presumption that government instrumentalities established as separate juridical entities are to be treated as legally distinct from the foreign sovereign. App. 4. Now, consider the opening clause of section 1610(g), quoted above. It refers to three categories of property: (i) "property of a foreign state against which a judgment is entered under section 1605A;" (ii) "property of an agency or instrumentality of such a state;" and (iii) "property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." Removing the *Bancec* barrier merely enables judgments against foreign states to be enforced against the states' juridically independent agencies and instrumentalities. Thus, it is reasonable that the statute would allow execution upon property that falls into category (iii).

But, the Seventh Circuit's construction cannot account for the statute's inclusion of categories (i) and (ii). The *Bancec* barrier could never interfere with execution upon "property of a foreign state" for purposes of enforcing a judgment entered against that very state. It is absurd to even discuss the separate entity rule in such a case. The same holds true for "property of an agency or instrumentality" that is not separate juridical entity (i.e., category (ii)). There is neither a need nor a possibility of removing a separate entity barrier when there is no separate entity. When judgment creditors seek to enforce their judgments against

property of the state defendant, itself, or against property of agencies and instrumentalities that are not juridically separate, it is incongruous to even discus removing the *Bancec* barrier. The Ninth Circuit and other courts were correct in rejecting the Seventh Circuit's construction of 1610(g).

The Seventh Circuit understood that treating section 1610(g) as an independent immunity exception would render subsections 1610(a)(7) and 1610(b)(3) superfluous. Those sections permit enforcement of terrorism judgments under the commercial property exceptions to execution immunity. The Seventh Circuit is wrong. Section 1610(g) applies only to enforcement of judgments entered under the new terrorism exception to jurisdictional immunity, 28 U.S.C. 1605A. It does not apply to judgments under the former terrorism exception, 1605(a)(7). *See* 28 U.S.C. 1610(g)(1). By contrast, subsections 1610(a)(7) and (b)(3) apply to enforcement under either provision.

The Ninth Circuit responded to this argument by pointing out that "the tension" between the commercial use provisions and subsection (g) "works in the opposite direction." *Bennett III*, 825 F.3d at 960. Section 1610(g) allows execution upon the "property" of the foreign state or its instrumentality. *Id.* It contains no reference to commercial use or activities. Reading into section 1610(g) a commercial use or commercial activity requirement would create limitations that Congress did not insert. *Id.*

The Seventh Circuit's construction of section 1610(g) renders much of the statute not only superfluous, but absurd. The text, policy, and history of section 1610(g) demonstrate that the statute ***both*** removes the Bancec barrier ***and*** creates an independent execution immunity exception as the Ninth Circuit held.

D. This Case Presents The Ideal Vehicle For Resolving The Circuit Split.

1. This case presents the ideal vehicle for resolving the circuit split over the question of whether section 1610(g) creates an independent execution immunity exception. The question presented was squarely addressed by the court of appeals. App. 21-35. And, the court's answer to the question was outcome determinative. As the Ninth Circuit held, under section 1610(g), "[t]he only requirement [for execution] is that property be 'the property of' the foreign state or its instrumentality." *Bennett III*, 825 F.3d at 960.

2. Additionally, the unique facts of this case will enable the Court to test the full scope of the 1610(g) immunity exception. This case has proceeded until now with a very large elephant in the room – the Iranian property upon which the petitioners seek to execute are antiquities that have been in the possession of the University of Chicago for eighty years. Many consider property of this nature to be sacrosanct and not appropriate for attachment and execution. *See Bennett III*, 825 F.3d at 969 (Benson D.J. dissenting).

To demonstrate, in the *Bennett* rehearing, Iran urged the Ninth Circuit to construe section 1610(g) narrowly to prevent the petitioners in *Rubin* from using the Ninth Circuit's ruling as precedent to execute upon Artifacts in Chicago. *See id.* At that time, this case was already pending in the Seventh Circuit. *Id.* Iran understood that it could influence the *Bennett* court's construction of the statute with an outcome-oriented argument focused on the threat that the court's decision in *Bennett* might render the Artifacts in *Rubin* subject to execution.

Iran's tactic was partially successful. *See id.* Chief District Judge Benson adopted this argument in his dissenting opinion; he argued that allowing the seizure of the Persian artifacts "would be an unfortunate and unjust result." *Id.* The *Bennett* majority dismissed Chief District Judge Benson's concerns: "it is not our province to decide whether the policy choices embodied in a statute are wise or unwise; our task is, rather, to discern congressional intent." *Bennett III*, 825 F.3d 960 n.6.

Judge Benson's distress over the Artifacts was unjustified. The petitioners never sought to wantonly "auction off" the Artifacts. They consistently requested that the court appoint a receiver to identify appropriate institutional purchasers, such as museums or universities. Petitioners also maintained that Iran itself could redeem the Artifacts by paying the judgment, which would obviate any "unfortunate and unjust results," not the least of which being that American victims of Iranian terrorism remain with an unenforced

judgment nearly 20 years following the attack that gave rise to Iranian liability.

The very fact that Iran raised concerns about permitting attachment of antiquities in the Ninth Circuit – while *Rubin* was still pending in the court below, and the fact that both the *Bennett* majority and dissent felt compelled to address this concern, demonstrate that the *Rubin* case is an ideal vehicle for resolving this circuit split. Determining whether the Artifacts are subject to execution will test the outer limits of the Ninth Circuit's holding that section 1610(g) allows execution upon ***all*** Iranian property.

As discussed above (Part II.C., *supra*), because section 1610(g) does not override other law, even under *Bennett*, some restrictions on execution would remain, including the FSIA's central bank immunity provision and prohibitions against attachment and execution upon diplomatic property. *See Bank Markazi*, 136 S. Ct. 1318 n.2; *Wyatt v. Syrian Arab Republic*, 83 F. Supp. 3d 192 (D.D.C. 2015).

II. Declaring A Consensus As To The Meaning Of Section 1610(a), The Seventh Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

The court's holding on 1610(a) presents an important question of federal law that has not been, but should be, settled by this Court for at least three fundamental reasons. *First*, this Court has repeatedly

admonished parties and the lower courts that an unambiguous statutory text resolves any questions regarding its proper construction. *See* Part II.A., *supra*. The Seventh Circuit abandoned the plain meaning of section 1610(a), looking instead to other sources to create, and then resolve, ambiguity. The Court should reaffirm its prior holdings that the FSIA, like any other statute, must be construed according to a plain reading of the text.

Second, by declaring "consensus" among the federal courts of appeal when, in fact, none exists, the court's decision will have the effect of preempting further consideration of this question by other courts, both because parties will be deterred from raising it, and because the courts will simply fall into line with the false consensus. This is particularly troubling because the Seventh Circuit's construction of the statute is at odds with Congressional intent as expressed in the statutory text.

Third, section 1610(a) potentially applies to enforcement proceedings against any foreign state judgment debtor. Its proper construction is likely to influence the outcome in a wide variety of cases. *See* § 1610(a)(1)-(7). To ensure that one appellate panel does not unilaterally establish as settled law an erroneous interpretation of section 1610(a) that would impact so many cases the Court should resolve this important question.

A. The Seventh Circuit Interpretation Of Section 1610(a) Requires Review.

The opening paragraph of section 1610(a) provides in part, "The property in the United States of a foreign state . . . ***used*** for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution. . . ." *Id.* (*emphasis supplied*). The statute does not specify that the foreign sovereign itself must use the property for commercial activity; it merely specifies that the property must be so used. Indeed, the district court acknowledged that "Section 1610 does not explicitly limit the executional immunity exception to activity conducted solely by the sovereign." App. 51.

1. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189, 194 (1984). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461-62 (2002) (*citations omitted*). "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* at 450.

The Supreme Court's insistence upon strict adherence to statutory text has been particularly forceful in

its FSIA jurisprudence. The Court has consistently and repeatedly admonished against reading unintended and non-textual restrictions into the FSIA. Most recently, in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014), the Court held that "any sort" of immunity defense rises or falls on the Act's text alone. *NML Capital* quoted from the Court's earlier pronouncement in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992): "the question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA." 134 S. Ct. at 2258. Again, the text, as enacted by Congress governs.

2. The Seventh Circuit held that section 1610(a)'s use of the passive voice ("property . . . used for a commercial activity") raises the question: "Whose commercial use counts?" App. 16. On the contrary, as this Court has held, the passive voice does not raise the question, it ***preempts*** the question.

In *Dean v. United States*, 556 U.S. 568, 572 (2009), the Court interpreted 18 U.S.C. § 924, which, among other things, "criminalizes using or carrying a firearm in relation to any violent or drug trafficking crime or possessing a firearm in furtherance of such a crime." *Dean*, 556 U.S. at 570. Section 924(c)(1)(A) increases the mandatory minimum sentence if the firearm "is brandished [or] discharged." This sentencing provision employs a passive voice.

The *Dean* Court rejected the defendant's argument that the statute required proof that the defendant intended to discharge the firearm. "The passive

voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Dean*, 556 U.S. at 572. The passive voice did not create ambiguity. It provided the Court with the tools for reading the statute according to its terms. It did not raise the question; it resolved the question.

In *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011), the Ninth Circuit followed *Dean* when it interpreted the FSIA's expropriation exception, which provides that a foreign state is not immune in certain cases "in which rights in property taken in violation of international law are in issue. . . ." 28 U.S.C. § 1605(a)(3). The court held that even though Spain was not the foreign state that expropriated the property, the jurisdictional immunity exception was satisfied. The court found that the "plain language of the statute does not require that the foreign state against whom the claim is made be the entity which took the property in violation of international law." 616 F.3d at 1028. Citing the Supreme Court's decision in *Dean*, the court held: "The text is written in the passive voice, which focuses on an event that occurs without respect to a specific actor." *Id.*

3. Dismissing *Dean* and ignoring *Cassirer*, the Seventh Circuit claimed that section 1610(a) could only be construed by reference to 28 U.S.C. § 1602, the FSIA's Findings and Declaration of Purpose. App. 17-18. The court quoted one sentence from section 1602. App. 17:

> Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.

The court focused on the references to foreign states' commercial activities, and for emphasis, italicized the word "their" everywhere it appears in the quoted sentence. App. 17. The Seventh Circuit concluded from the italics-enhanced excerpt from section 1602 that section 1610(a) cannot be construed as written – to permit execution upon foreign states' property regardless of who uses it. App. 17-18. The court's reasoning is flawed.

The court italicized words that Congress did not emphasize and misconstrued section 1602. The purpose of the FSIA is not, as the Seventh Circuit held, to prevent execution upon foreign state's property used by others. *See* App. 17. Rather as this Court has held, the dual purposes of the FSIA, as stated in section 1602, are: (1) to endorse and codify the "restrictive theory" of sovereign immunity (which restricts immunity, not the exceptions to immunity), and (2) to transfer primary responsibility for deciding claims of foreign states to immunity from the Executive Branch to the courts. *See Samantar*, 560 U.S. at 313. Thus, even if one were to look to the statutory Findings and Statement of Purpose to construe an otherwise unambiguous statute, section 1602 provides no guidance.

B. This Case Presents The Ideal Vehicle For Determining Whether Only Use By The Foreign State Subjects Property To Execution Under § 1610(a).

This case is not only a proper vehicle for resolving the 1610(a) question, it is probably the last chance for any court to explore the issue. As discussed above, the court of appeals declared a consensus among the federal appellate courts on this question. *Supra*, Part II.C. Also, as discussed above, none of the courts claimed to be part of this "consensus" dealt with the issue.

Connecticut Bank of Commerce v. Republic of Congo, 309 F.3d 240 (5th Cir. 2002) ("*CBC*"), involved a bank's attempt to garnish royalty and tax payments *owed to* the Republic of Congo by certain Texas oil companies pursuant to a joint venture. *Id.* at 246, 251. The court held that the royalties and payments were never "used for commercial activity." *Id.* at 257. They were the proceeds of that activity.

The court inserted a footnote containing a hypothetical and observed: "Even the bank appears to recognize that what matters under the statute is how the *foreign state* uses the property, not how private parties may have used the property in the past. Any property a "foreign state purchases from a private supplier will necessarily be used for commercial purpose by that supplier." *CBC*, 309 F.3d at 256 n.5. Note that in the court's hypothetical, when the supplier uses the property (to generate revenues) the property is not yet the property of the foreign state purchaser. Thus, the

property in the hypothetical falls outside the reach of section 1610(a), not because the use is not made by the state, but because when the property is used, it does not belong to the foreign state.

Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007), also claimed to be part of the "consensus," is based upon the same material facts as *CBC*, above. *See* 475 F.3d at 1084-85. *Af-Cap* is therefore easily distinguishable for the same reasons as *CBC*. Similarly, in *Aurelius Capital Partners, L.P. v. Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009), the court found that the assets in question had not been used for ***any*** purpose at all while they belonged to the state-owned instrumentality. 584 F.3d at 131. Not one of these cases cited by the Seventh Circuit as constituting an emerging consensus addressed the question presented here.

Future plaintiffs reading the Seventh Circuit's decision declaring a consensus would never attempt to attach and execute upon property of the foreign state defendant that is put to a commercial use by others. Similarly, assuming any plaintiffs even tried to enforce a judgment against such assets, lower courts would automatically fall into line with the false consensus.

To be sure, certainty and uniformity in the law are desirable. But, that is so only when the result is consistent with Congressional intent as expressed in the text of the statute. Here, the Seventh Circuit, ignored countless precedents of this Court and abandoned the text of section 1610(a), read a non-existent restriction

into the statute, and then unilaterally declared its holding to represent an "emerging consensus." Certainty and uniformity resulting from such a decision are damaging to the rule of law. Only this Court is able to set the record straight and restore to section 1610(a) its proper meaning.

CONCLUSION

To uphold both the text and the purpose of the FSIA's attachment immunity provisions; to resolve the circuit split and correct the erroneous holding of the Seventh Circuit as to section 1610(g); and to prevent a three-judge panel from declaring a national consensus on an important issue other courts have not even considered, the Court should grant the petition for a writ of certiorari and overrule both of these holdings of the Seventh Circuit.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 14-1935

JENNY RUBIN, *et al.*,

Plaintiffs-Appellants,

v.

ISLAMIC REPUBLIC OF IRAN,

Defendant-Appellee,

and

FIELD MUSEUM OF NATURAL HISTORY, *et al.*,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03 C 9370 – **Robert W. Gettleman**, *Judge.*

ARGUED APRIL 23, 2015 – DECIDED JULY 19, 2016

Before BAUER and SYKES, *Circuit Judges*, and REAGAN, *Chief District Judge.**

SYKES, *Circuit Judge.* In September 1997 three Hamas suicide bombers blew themselves up on a

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* Of the Southern District of Illinois, sitting by designation.

crowded pedestrian mall in Jerusalem. Among those grievously injured were eight U.S. citizens who later joined with a handful of their close relatives to file a civil action against the Islamic Republic of Iran for its role in providing material support to the attackers. Iran was subject to suit as a state sponsor of terrorism under the terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), then codified at 28 U.S.C. § 1605(a)(7). A district judge in the District of Columbia entered a $71.5 million default judgment. Iran did not pay.

So began more than a decade of unsuccessful litigation across the country to attach and execute on Iranian assets in order to satisfy the judgment. *See Rubin v. Islamic Republic of Iran*, No. Civ. A. 01-1655 (RMU), 2005 WL 670770, at *1 (D.D.C. Mar. 23, 2005), *vacated*, 563 F. Supp. 2d 38 (D.D.C. 2008) (granting and then vacating writs of execution against two domestic bank accounts used by Iranian consulates); *Rubin v. Islamic Republic of Iran*, 810 F. Supp. 2d 402 (D. Mass. 2011), *aff'd*, 709 F.3d 49 (1st Cir. 2013) (rejecting an effort to attach Iranian antiquities in the possession of various museums); *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014) (same). This appeal concerns the last decision on this list.

The plaintiffs sought to execute on four collections of ancient Persian artifacts located within the territorial jurisdiction of the Northern District of Illinois: the Persepolis Collection, the Chogha Mish Collection, and the Oriental Institute Collection, all in the possession

of the University of Chicago; and the Herzfeld Collection, split between the University and Chicago's Field Museum of Natural History. The case was last here on some procedural issues early in the attachment proceeding. *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012). It now returns on the merits.

A foreign state's property in the United States is immune from attachment and execution, *see* 28 U.S.C. § 1609, but there are a few narrow exceptions. The plaintiffs identified three possible paths to reach the artifacts: subsections (a) and (g) of 28 U.S.C. § 1610, both part of the FSIA; and section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322 (codified at 28 U.S.C. § 1610 note), which permits holders of terrorism-related judgments to execute on assets that are "blocked" by executive order under certain international sanctions provisions. The district court entered judgment against the plaintiffs, finding no statutory basis to execute on the artifacts.

We affirm. The assets are not blocked by existing executive order, so execution under TRIA is not available. Nor does § 1610(a) apply. That provision permits execution on a foreign state's property "used for a commercial activity in the United States." We read this exception to require commercial use by the foreign state itself, not a third party. Iran did not put the artifacts to any commercial use.

Lastly, § 1610(g) is not itself an exception to execution immunity. Instead, it partially abrogates the so-called *Bancec* doctrine, which holds that a judgment against a foreign state cannot be executed on property owned by its juridically separate instrumentality. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 626-29 (1983). The *Bancec* rule can be overcome in two ways: The holder of a judgment against a foreign state may execute on the property of its instrumentality if the sovereign and its instrumentality are alter egos or if adherence to the rule of separateness would work an injustice. *Id.*

Section 1610(g) lifts the *Bancec* rule for holders of terrorism-related judgments, allowing attachment in aid of execution "as provided in this section" without regard to the presumption of separateness – that is, without the requirement of establishing alter-ego status or showing an injustice. The phrase "as provided in this section" refers to the immunity exceptions found elsewhere in § 1610, one of which must apply to overcome execution immunity. So although subsection (g) substantially eases the enforcement process for terrorism victims by removing the *Bancec* barrier, it is not a freestanding terrorism exception to execution immunity.

I. Background

The artifacts at issue here arrived in the United States over a 60-year timespan beginning in the 1930s. In 1937 Iran loaned the Persepolis Collection – roughly

30,000 clay tablets and fragments containing some of the oldest writings in the world – to the University of Chicago's Oriental Institute for research, translation, and cataloguing. In 1945 the Field Museum purchased a collection of approximately 1,200 prehistoric artifacts from Dr. Ernst Herzfeld, a German archaeologist active in Persia in the early 20th century (the Herzfeld Collection). In the 1960s Iran excavated clay seal impressions from the ancient Chogha Mish settlement and loaned them to the University's Oriental Institute for academic study (the Chogha Mish Collection). Most items in this collection were returned to Iran in 1970, but the University has since located some objects previously missing from the collection. In the 1980s and 1990s, the Oriental Institute received several small donations of Persian artifacts from Iran and other donors. These artifacts are not really a discrete collection, but the parties refer to them as the "Oriental Institute Collection," so we'll do the same.

The plaintiffs are American victims of a suicide-bomb attack carried out by Hamas in Jerusalem on September 4, 1997, with material support from Iran. In 2003 the survivors and their close family members filed suit against Iran in federal court in the District of Columbia, proceeding under the terrorism exception to jurisdictional sovereign immunity, then codified at § 1605(a)(7) of the FSIA. (In January 2008 Congress repealed § 1605(a)(7) and enacted a new terrorism exception to jurisdictional sovereign immunity codified

at 28 U.S.C. § 1605A. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083,122 Stat. 3, 338-44.)

The plaintiffs won a $71.5 million default judgment, *see Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003), and quickly commenced enforcement actions around the country in an effort to collect. As relevant here, the plaintiffs registered the judgment in the Northern District of Illinois, initiating attachment proceedings for the purpose of executing on the four collections then in the possession of the University and the Field Museum.[1] (We'll refer to the University and the Field Museum collectively as "the Museums" unless the context requires otherwise.)

Significant procedural battles ensued. We resolved these disputes in our earlier opinion and need not repeat that litigation history. *See Rubin*, 637 F.3d at 786-89. For present purposes it's enough to note that the plaintiffs initially proposed two possible ways to overcome Iran's execution immunity. First, they invoked § 1610(a), the "commercial activity" exception to execution immunity. Second, they pointed to TRIA, which permits execution on the blocked assets of a state sponsor of terrorism (or its agency or instrumentality) to satisfy a judgment obtained under the terrorism exception to jurisdictional sovereign immunity.

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[1] The plaintiffs later converted their § 1605(a)(7) judgment to one under § 1605A. *See Rubin v. Islamic Republic of Iran*, 270 F.R.D. 7, 9 & n.3 (D.D.C. 2010).

After we sent the case back to the district court, the parties engaged in discovery on the four collections, and Iran and the Museums moved for summary judgment. The district judge granted the motion. First, he rejected the plaintiffs' claim that the artifacts are subject to execution under § 1610(a). The judge read this exception as limited to property used for a commercial activity by *the foreign state itself*. Because Iran hadn't used the artifacts for commercial activity, the judge held that § 1610(a) does not apply.

The judge also held that because the assets in question are not blocked – i.e., frozen – by any current executive order, execution under TRIA is likewise unavailable.

Finally, in their response to the summary-judgment motion, the plaintiffs identified a third possible path to reach the artifacts: § 1610(g), which they argued is an independent exception to execution immunity available to victims of state-sponsored terrorism. The judge rejected this argument too, concluding that subsection (g) abrogates the *Bancec* rule for terrorism-related judgments but is not a freestanding terrorism exception to execution immunity.

Finding no statutory basis to execute on the artifacts, the judge entered judgment for Iran and the Museums. The plaintiffs appealed, reprising all three arguments.

II. Discussion

A. Which Artifacts Remain at Issue?

Our first task is to identify which of the four collections is even potentially subject to attachment and execution at this juncture. Two basic criteria apply: (1) the artifacts must be owned by Iran, and (2) the artifacts must be within the territorial jurisdiction of the district court. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014) ("Our courts generally lack authority in the first place to execute against property in other countries. . . .") (citation omitted); *see also Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction.").

There's no dispute that the Persepolis Collection is owned by Iran and is in the physical possession of the University. The three other collections, however, are outside the reach of this proceeding for reasons relating to their present location or the absence of Iranian ownership.

As we've just explained, when the district court entered judgment, the University had possession of remnants of the Chogha Mish Collection. But intervening developments have placed these artifacts beyond the grasp of the federal courts. After filing their notice

of appeal, the plaintiffs asked us to stay the district court's judgment pending appeal. We denied the motion. The State Department then informed the University that the United States was obligated to return the Chogha Mish artifacts to Iran. The University, in turn, notified us that it would return the Chogha Mish artifacts to Iran within 45 days unless the court ordered otherwise. We did not order otherwise. So the University delivered the artifacts to Iran's National Museum in Tehran and filed notice with the court that Iran received and accepted them. Accordingly, the Chogha Mish Collection is no longer within the territorial jurisdiction of the district court.

The Herzfeld and the Oriental Institute Collections remain within the court's territorial jurisdiction, but they are not Iranian property. The plaintiffs have tried to cast doubt on the legitimacy of their removal from Iran, arguing that Dr. Herzfeld is regarded by some in the academic community as a plunderer and that the artifacts in these collections are covered by Iran's National Heritage Protection Act of 1930, which gives the government of Iran an option to exercise control over certain antiquities unearthed in the country. The Museums, on the other hand, maintain that they were bona fide purchasers or recipients of these collections; the plaintiffs have not meaningfully contested this point.

We don't need to resolve any questions about the provenance of the Herzfeld and Oriental Institute Collections or explore the circumstances under which the Museums acquired them. As the plaintiffs concede,

Iran has expressly disclaimed any legal interest in the two collections, and the district judge found that no evidence supports Iranian ownership of these artifacts. The plaintiffs have not given us any reason to disturb this ruling, and we see none ourselves.

Because the Chogha Mish Collection is no longer within the territorial jurisdiction of the district court and Iran has disclaimed ownership of the Herzfeld and Oriental Institute Collections, we confine our merits review to the Persepolis Collection.

B. Statutory Framework

We traced the history of the foreign sovereign immunity doctrine and the enactment of the FSIA in our earlier opinion. *See Rubin*, 637 F.3d at 792-94. A brief repetition is helpful to a proper understanding of the statutory-interpretation questions presented here.

Foreign sovereign immunity "is a matter of grace and comity on the part of the United States," and for much of our nation's history was left to the discretion of the Executive Branch. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). As such, federal courts "consistently . . . deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Id.* Under the common-law doctrine, a diplomatic representative of the foreign state would request a "suggestion of immunity" from the State Department, and if the State Department obliged, the

court would surrender jurisdiction without further inquiry; absent a suggestion of immunity, the court would decide the immunity question itself based on policies established by the State Department. *Rubin*, 637 F.3d at 793. Either way, "[t]he process . . . entailed substantial judicial deference to the Executive Branch." *Id.*

Even if a court acquired jurisdiction and awarded judgment against a foreign state, "the United States gave absolute immunity to foreign sovereigns from the execution of judgments." *Autotech*, 499 F.3d at 749. Successful plaintiffs had to rely on voluntary payment by the foreign state. *Id.*

In 1952 the State Department adopted a "restrictive" theory of foreign sovereign immunity, conferring jurisdictional immunity in cases arising out of a foreign state's "public acts" but withholding it in "cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487. "Under the restrictive, as opposed to the 'absolute,' theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)." *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993). Even under this theory, however, foreign sovereign property remained absolutely immune from execution. *Autotech*, 499 F.3d at 749.

The State Department's shift to the restrictive theory of jurisdictional immunity "'[thr[ew] immunity

determinations into some disarray,' since 'political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available.'" *NML Capital*, 134 S. Ct. at 2255 (brackets in original) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004)). Essentially, "sovereign immunity determinations were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488.

In 1976 Congress stepped in and enacted the FSIA, which "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992). The Act establishes a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden*, 461 U.S. at 488. "The key word . . . is *comprehensive*." *NML Capital*, 134 S. Ct. at 2255. "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 2256.

The Act codifies the two common-law immunities we've just discussed – jurisdictional immunity (28 U.S.C. § 1604) and execution immunity (*id.* § 1609). Only the latter is at issue here. Section 1609 states that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611

of this chapter." Accordingly, the Persepolis Collection is immune from attachment and execution unless an exception listed in § 1610 applies. (Section 1611 of Title 28 of the U.S. Code lists exceptions to the exceptions and is not implicated here.)

The most prominent are the so-called commercial-activity exceptions found in subsections (a) and (b) of § 1610. Under § 1610(a) a person who holds a judgment against a foreign state may execute it on the foreign state's property "used for a commercial activity in the United States" *if* one of seven listed conditions is met. Similarly, under § 1610(b) a person who holds a judgment against a foreign state's instrumentality may execute it on "any property in the United States of [the] . . . instrumentality . . . engaged in commercial activity in the United States" *if* one of three listed conditions is met.

So to summarize, at common law execution immunity was absolute, *Autotech*, 499 F.3d at 749, but subsections (a) and (b) of § 1610 together codify a narrower version of the restrictive theory of jurisdictional immunity for the execution of judgments, allowing successful claimants to attach and execute on foreign sovereign property "used for a commercial activity" in this country, at least in some circumstances.[2]

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[2] Section 1610 also permits in rem execution of certain foreclosure judgments against a foreign state's vessels. 28 U.S.C. § 1610(e). Other parts of § 1610 address, for example, certain procedural requirements for execution, *see, e.g.*, *id.* § 1610(c), and the

The plaintiffs point to § 1610(a) and § 1610(g) as possible paths to reach the artifacts. They also rely on section 201(a) of TRIA. We turn to these arguments now.

C. 28 U.S.C. § 1610(a)

As we've just explained, § 1610(a) establishes rules for executing a judgment against a foreign state on the foreign state's property; § 1610(b) establishes rules for executing a judgment against a foreign state's instrumentality on the instrumentality's property. The judgment here is against Iran, and Iran owns the Persepolis Collection, so subsection (a) is the relevant subsection.

Generally speaking, § 1610(a) permits the holder of a judgment against a foreign state to execute on property of the foreign state "used for a commercial activity in the United States" but only if one of seven enumerated conditions is satisfied. For example, a judgment creditor may proceed against a foreign state's property "used for a commercial activity in the United States" if the foreign state has expressly or impliedly waived execution immunity, § 1610(a)(1); or if the property in question "was used for the commercial activity upon which the claim is based," § 1610(a)(2); or if "the judgment is based on an order confirming an arbitral award," § 1610(a)(6).

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sensitive matter of prejudgment attachment of foreign sovereign property, *id.* § 1610(d).

At issue here is subsection (a)(7), which permits attachment and execution if the following terms are met:

> **(a)** The *property in the United States of a foreign state, . . . used for a commercial activity in the United States, shall not be immune* from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, *if* –
>
> . . .
>
> > **(7)** *the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)* [the present and former terrorism exceptions to jurisdictional immunity] . . . regardless of whether the property is or was involved with the act upon which the claim is based.

§ 1610(a)(7) (emphases added).

The plaintiffs obtained their judgment against Iran in 2003 under § 1605(a)(7), the terrorism exception to jurisdictional immunity then in effect. In 2008 Congress replaced § 1605(a)(7) with § 1605A, and the plaintiffs converted their judgment to one under the new statute. So there's no question that the special condition in subsection (a)(7) is satisfied.

That leaves the basic "commercial activity" requirement of § 1610(a). The dispute here centers on the key statutory phrase identifying the property that may

be subject to execution under this exception: "property in the United States of a foreign state . . . used for a commercial activity in the United States." § 1610(a). The passive-voice phrasing of this sentence raises an interpretive question: *Used by whom?*

The plaintiffs contend that *a third party's* commercial use of the property triggers § 1610(a) and that the University's academic study of the Persepolis Collection counts as a commercial use. Iran and the University counter that the foreign state *itself* must use its property for a commercial activity, and regardless, academic study isn't a commercial use. The United States has weighed in as an amicus curiae on the side of the interpretation urged by Iran and the University – namely, that the exception in § 1610(a) applies *only* when the foreign sovereign itself (not a third party) uses the property for a commercial activity.

We're skeptical that academic study qualifies as a commercial use, but we'll put that question aside and focus on the antecedent one: *Whose commercial use counts?*

The Fifth Circuit has held that § 1610(a) is triggered only when the foreign state *itself* uses its property in the United States for a commercial activity. *See Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002) ("[W]hat matters under the statute is how the *foreign state* uses the property, not how private parties may have used the property.").

The Second and Ninth Circuits agree. *See Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120,

131 (2d Cir. 2009) ("The commercial activities of the private corporations who managed these assets are irrelevant to this inquiry. . . . [B]efore the retirement and pension funds at issue could be subject to attachment, the funds *in the hands of the Republic* must have been 'used for a commercial activity.'"); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1090-91 (9th Cir. 2007) (adopting the Fifth Circuit's interpretation).

We think these circuits have understood § 1610(a) correctly. It's true that a legislature's use of the passive voice sometimes reflects indifference to the actor. *See Dean v. United States*, 556 U.S. 568, 572 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor. . . ."). But attributing indifference to Congress in this instance would be inconsistent with the FSIA's statutory declaration of purpose, which explicitly invokes the international law understanding of foreign sovereign immunity: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities." 28 U.S.C. § 1602 (emphases added).

Section 1602 thus instructs courts to interpret the immunities and exceptions in the FSIA against the backdrop of the international law norm that foreign sovereigns do not have immunity for "*their* commercial activities" or immunity from execution on "*their* commercial property." This suggests that a foreign

sovereign's property is subject to execution under § 1610(a) only when the sovereign *itself* uses the property for a commercial activity. While the passive-voice phrasing in § 1610(a) introduces some ambiguity about whose commercial use matters, § 1602's declaration of purpose clarifies that foreign states may lose execution immunity only by virtue of *their own* commercial use of their property in the United States, not a third party's.

The plaintiffs object that the declaration of purpose isn't relevant because resort to legislative history is not necessary when the statutory language is unambiguous. We disagree for two reasons. First, § 1602 is *legislation*, not legislative history. It was written, debated, and enacted by Congress and signed into law by the President – in the same manner and at the same time as § 1610. None of the standard objections to judicial reliance on legislative history inhibit our resort to a *statutory* declaration of purpose for help in interpreting a part of the statute to which it applies.[3]

Second, as we've just noted, the passive-voice phrasing of § 1610(a) creates uncertainty about *whose* commercial use of the property suffices to forfeit a foreign state's execution immunity. The text itself raises the question, and the uncertainty is all the more apparent when subsection (a) is considered in its broader statutory context. *See King v. Burwell*, 135 S. Ct. 2480,

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[3] We're not suggesting, however, that a legislative statement of purpose provides statutory meaning independent of the operative statutory text.

2489 (2015) ("[O]ftentimes the 'meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" (citation omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 438, 450 (2002))). The FSIA starts with a baseline rule of execution immunity; the exceptions are few and "narrowly drawn." *Autotech*, 499 F.3d at 749.

Given the broad protective stance of the statutory scheme in general, we cannot say with confidence that § 1610(a) *unambiguously* abrogates a foreign sovereign's execution immunity when a third party uses its property for a commercial activity. Rather, the statutory declaration of purpose suggests that a narrower interpretation is correct: A foreign state may lose its execution immunity only by *its own* commercial use of its property in the United States.

Trying another tack, the plaintiffs direct our attention to the language of § 1605(a), the commercial-activity exception to jurisdictional immunity, which specifically states that the commercial activity must be "carried on in the United States *by the foreign state*" before immunity is lost. (Emphasis added.) The absence of similar language in § 1610(a), they argue, means that the commercial-activity exception to execution immunity is broader than its parallel in § 1605(a) and applies whenever a third party uses a foreign state's property for a commercial activity.

This argument contradicts the settled principle that the exceptions to execution immunity are narrower than, and independent from, the exceptions to jurisdictional immunity. *NML Capital*, 134 S. Ct. at 2256; *Rubin*, 637 F.3d at 796; *DeLetelier v. Republic of Chile*, 748 F.3d 790, 798-99 (2d Cir. 1984). This principle is both well established and based on a critical diplomatic reality: Seizing a foreign state's property is a serious affront to its sovereignty – much more so than taking jurisdiction in a lawsuit. Correspondingly, judicial seizure of a foreign state's property carries potentially far-reaching implications for American property abroad.

The plaintiffs' interpretation of § 1610(a) turns this important principle on its head. A third party's commercial use of a foreign state's property, which cannot establish jurisdiction over the foreign state, would suffice to strip the foreign state's property of its execution immunity. That cannot be right.

Accordingly, we join the emerging consensus of our sister circuits and hold that a third party's commercial use of a foreign state's property does not trigger the § 1610(a) exception to execution immunity. Rather, § 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity in the United States; the actions of third parties are irrelevant.

Nothing in the record suggests that Iran itself used the Persepolis Collection for a commercial activity in the United States. Indeed, the plaintiffs do not

argue otherwise. The district court reached the correct conclusion: Section 1610(a) does not apply.[4]

D. 28 U.S.C. § 1610(g)

Alternatively, the plaintiffs argue that § 1610(g) provides an independent basis to execute on the artifacts. A bit of background is necessary before we take up this argument.

Congress enacted § 1610(g) as part of the National Defense Authorization Act of 2008, which ushered in several changes to the FSIA as applied in cases of state-sponsored terrorism. We've already mentioned one: Section 1605A replaced § 1605(a)(7), the previous terrorism exception to jurisdictional immunity. Section 1605A includes an identical exception to jurisdictional immunity but "is more comprehensive and more favorable to plaintiffs because it adds a broad array of substantive rights and remedies that simply were not available in actions under" the previous law. *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 58 (D.D.C. 2009).

The other major change was the creation of § 1610(g), which applies to execution proceedings to enforce judgments obtained under § 1605A and eases the collection process for victims of state-sponsored terrorism by eliminating the *Bancec* rule that foreign

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[4] Our holding makes it unnecessary to decide whether the University's academic study of the Persepolis Collection is a commercial use.

sovereigns and their instrumentalities are treated separately for execution purposes. The 2008 legislation also provided that certain judgments obtained under the old § 1605(a)(7) could be converted to judgments under § 1605A so that judgment creditors could access the benefits of § 1610(g). The plaintiffs successfully converted their judgment, and they now contend that § 1610(g) makes *all* Iranian assets available for execution without proof of a nexus to commercial activity – that is, without having to satisfy § 1610(a). They argue, in other words, that subsection (g) is a freestanding exception to execution immunity for terrorism-related judgments.

Iran and the University dispute that interpretation. They agree that subsection (g) was intended to – and does – make it easier for terrorism victims to enforce their judgments. But they maintain that it does so *only* by abrogating the *Bancec* doctrine for § 1605A judgments; subsection (g) is not itself an exception to execution immunity. The United States supports this interpretation and joins Iran and the University in urging us to adopt it.

We begin with the *Bancec* doctrine, which derives from the Supreme Court's 1983 decision known by that name. *Bancec* established a general presumption that a judgment against a foreign state may not be executed on property owned by a juridically separate agency or instrumentality. 462 U.S. at 626-27 ("Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . .

that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.") (citation omitted). That's the general rule in the law of private corporations, and the Court applied it to the juridically separate instrumentalities of foreign governments. *Id.* The Court recognized two exceptions: The holder of a judgment against a foreign state may execute on the property of its instrumentality if the sovereign and its instrumentality are alter egos or if adherence to the rule of separateness would work a fraud or injustice. *Id.* at 628-33.

The Court expressly declined to elaborate on these exceptions, however. *Id.* at 633 ("Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded."). So the lower courts had to fill the gap. Soon after *Bancec* was decided, the federal courts began to coalesce around a set of five factors for determining when the exceptions applied. *See, e.g.*, *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1380-82, 1380-81 n.7 (5th Cir. 1992). The following formula from the Fifth Circuit is typical; courts should consider:

> (1) The level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;

> (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Walter Fuller Aircraft, 965 F.2d at 1380 n.7.

Fast forward to 2008 and the enactment of the National Defense Authorization Act, which created § 1605A and § 1610(g). In relevant part, § 1610(g) states:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, *and* the property of an agency or instrumentality of such a state, . . . is subject to attachment . . . and execution . . . *as provided in this section*, regardless of –
>
> **(A)** the level of economic control over the property by the government of the foreign state;
>
> **(B)** whether the profits of the property go to that government;
>
> **(C)** the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> **(D)** whether that government is the sole beneficiary in interest of the property; or
>
> **(E)** whether establishing the property as a separate entity would entitle the

> foreign state to benefits in United States courts while avoiding its obligations.

(Emphases added.)

Put more succinctly, subsection (g) permits a terrorism victim who wins a § 1605A judgment to execute on the property of the foreign state *and* the property of its agency or instrumentality "*as provided in this section*" but "*regardless of*" the five factors listed in subsections (A) – (E).

As the careful reader no doubt has grasped, the five factors made irrelevant by subsection (g) mirror almost exactly the factors developed by the lower courts under the *Bancec* doctrine. For ease of comparison, we've prepared this chart:

***Bancec* Doctrine Factors**	**Factors Made Irrelevant by Subsection (g)**
(1) the level of economic control by the government;	(A) the level of economic control over the property by the government of the foreign state;
(2) whether the entity's profits go to the government;	(B) whether the profits of the property go to that government;
(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;	(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(4) whether the government is the real beneficiary of the entity's conduct; and	(D) whether that government is the sole beneficiary in interest of the property; or
(5) whether adherence to separate identities would entitle the foreign state to benefits in Unite States courts while avoiding its obligations.	(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

The nearly identical language is either a stunning coincidence or Congress drafted subsection (g) to abrogate the *Bancec* doctrine for terrorism-related judgments. It's impossible to ignore the clear textual parallels between subsection (g), the *Bancec* rule, and the preexisting caselaw. Indeed, we've already noted that subsection (g) overrides the *Bancec* doctrine for terrorism-related judgments. *See Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014).

The key question here – a question not expressly decided in *Gates* – is whether, as the plaintiffs contend, subsection (g) goes further and establishes a freestanding "terrorism" exception to execution immunity.

Iran and the University – with support from the United States – caution against reading a corrective measure so plainly aimed at eliminating the *Bancec* barrier as creating a new and independent exception to execution immunity for all terrorism-related judgments. They direct our attention to language in

subsection (g) specifically limiting its scope: The text says that for § 1605A judgments, the property of a foreign state and the property of its agency or instrumentality are "subject to attachment . . . and execution . . . *as provided in this section*." The highlighted phrase makes very little sense – indeed, is entirely superfluous – if subsection (g) is itself a freestanding exception to execution immunity. The plaintiffs' reading of subsection (g) thus violates the "cardinal principle" that a statute should be interpreted to avoid superfluity. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

The plaintiffs suggest that the phrase "as provided in this section" refers to only the "non-substantive rules" set forth in § 1610. But they offer no basis for limiting the phrase in that manner, nor have they identified which non-substantive rules they think Congress meant to include in subsection (g). Moreover, it would be very odd to read "as provided in this *section*" as referring only to certain unidentified subsections of § 1610. The word "section" must mean what it says: Subsection (g) modifies *all* of § 1610.

Treating § 1610(g) as an independent basis for execution also creates superfluities in other parts of the statute. For example, subsections (a)(7) and (b)(3) of § 1610 relate specifically to judgments obtained under § 1605A, the current terrorism exception to jurisdictional immunity, and its predecessor, § 1605(a)(7). If subsection (g) paves a dedicated lane for all execution

actions by victims of state-sponsored terrorism, then § 1610(a)(7) and (b)(3) serve no purpose at all.[5]

In their reply brief, the plaintiffs seek refuge in our decision in *Gates*, which they say has already resolved this interpretive question in their favor. We disagree, though we can see how *Gates* might be read in that way. *Gates* involved a lien-priority contest between two sets of terrorism victims holding § 1605A judgments against Syria. 755 F.3d at 572-73. Both sets of victims – the "Gates plaintiffs" and the "Baker plaintiffs" – sought to execute on the same assets owned by Syrian instrumentalities but held by an American bank and a telecommunications company and located within the territorial jurisdiction of the Northern District of Illinois. *Id.* at 573-74. The dispute concerned compliance with the procedural requirements of § 1610(c). That subsection provides that

> [n]o attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and

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[5] Moreover, as we've noted, subsection (g) was enacted at the same time as § 1605A. In the same 2008 legislation, subsections (a)(7) and (b)(3) of § 1610 were amended to make the commercial-activity exceptions applicable to judgments obtained under § 1605A, the new exception to jurisdictional immunity for terrorism-related cases. If, as the plaintiffs claim, subsection (g) were a free-standing exception to execution immunity for § 1605A judgments, then these amendments – enacted at the same time – were completely unnecessary.

> the giving of any notice required under section 1608(e) of this chapter.

§ 1610(c). The cross-referenced provision establishes rules for obtaining a default judgment against a foreign state or its agency or instrumentality. 28 U.S.C. § 1608(e).

The Gates plaintiffs obtained a § 1610(c) order from the district court in the District of Columbia, where their judgment was entered, then registered the judgment in the Northern District of Illinois, where the assets of the Syrian instrumentality were located. A few days later, the Baker plaintiffs also registered their judgment in the Northern District of Illinois, but "[u]nlike the Gates plaintiffs, . . . [they] sought and obtained a new § 1610(c) order from the Northern District of Illinois." *Gates*, 755 F.3d at 574. The Baker plaintiffs then argued that their lien had priority because the Gates plaintiffs hadn't obtained a new § 1610(c) order in the Northern District of Illinois. The Gates plaintiffs responded with two arguments: First, "§ 1610(c) does not apply at all," and second, "even if it does, one order per judgment suffices for attachment and execution anywhere in the United States." *Id.* at 575.

The panel sided with the Gates plaintiffs, ruling in their favor on both grounds, either of which was independently sufficient to support the judgment. *Id.* at 578 ("For two independent reasons, then, § 1610(c) does not bar the priority of the Gates plaintiffs' liens. . . ."). Addressing the first argument, the panel

noted that the Gates plaintiffs "are not seeking attachment under § 1610(a) or (b). They seek attachment under § 1610(g), which authorizes attachment of property of foreign state sponsors of terrorism and their agencies or instrumentalities to execute judgments under § 1605A for state-sponsored terrorism." *Id.* at 575. The panel continued: "Section 1610(g) is not mentioned in § 1610(c). By its terms, then, § 1610(c) simply does not apply to execution or attachment under § 1610(g)." *Id.*

Alternatively, the panel held that "[e]ven if § 1610(c) applie[s] to attachment efforts under § 1610(g)," one order "suffices for attachment efforts throughout the United States." *Id.* at 577. The § 1610(c) order issued by the D.C. district court was thus sufficient; the Gates plaintiffs "were not required to seek a duplicative determination of the same question by the Northern District of Illinois before attaching the Syrian assets." *Id.* at 578.

Notably, *Gates* assumes rather than decides the crucial antecedent question – that is, whether § 1610(g) is itself a freestanding exception to execution immunity. Instead, it simply describes subsection (g) in a way that implies an affirmative answer. Perhaps that's not surprising; the issue was not developed by the parties. To be sure, the *Gates* opinion touches on the *Bancec* doctrine, observing that § 1610(g) "was intended to avoid limits the Supreme Court had imposed on the ability of litigants to attach the assets of foreign state agencies and instrumentalities." *Id.* at 576. And there's no doubt that the opinion *treats* § 1610(g) as if

it *were* an independent exception to execution immunity, albeit without actually deciding the question. Indeed, that's the premise of the panel's holding that § 1610(c) does not apply.

But nowhere does the *Gates* opinion grapple with the fundamental interpretive question presented here. Instead, the parties and the court appear to have assumed without further inquiry that subsection (g) is an independent basis for attachment and execution for all terrorism-related judgments. Tellingly, there's no mention in *Gates* of the limiting phrase in subsection (g) "as provided in this section," nor any reference to the statutory superfluities created by the broader interpretation advanced by the Rubin plaintiffs here.

A second appeal from the same attachment proceeding – this time involving a dispute between the Gates plaintiffs and the "Wyatt plaintiffs" – again found for the Gates plaintiffs but likewise neither raised nor decided the antecedent interpretive question. *See Wyatt v. Syrian Arab Republic*, 800 F.3d 331, 342-43 (7th Cir. 2015). The Wyatt plaintiffs mounted a collateral challenge to the § 1610(c) order that the Gates plaintiffs had obtained from the D.C. district court. *Id.* at 334-35, 342. The panel did not directly address this argument, relying instead on the holding of *Gates* that "'§ 1610(c) simply does not apply to the attachment of assets to execute judgments under § 1610(g) for state-sponsored terrorism.'" *Id.* at 343 (quoting *Gates*, 755 F.3d at 575). As in *Gates*, the opinion in *Wyatt* does not mention the fundamental interpretive question about the scope of § 1610(g). *Wyatt*

thus left the unexamined premise of *Gates* unexamined.

In the meantime, the Ninth Circuit has been wrestling with the precise question presented here in a case involving assets of Bank Melli, an instrumentality of Iran. A panel of that court initially adopted the interpretation urged by the Rubin plaintiffs here – that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments. *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1287 (9th Cir. 2015). Bank Melli petitioned for rehearing, and three weeks later the panel invited the views of the United States on the proper interpretation of § 1610(g). The United States responded, taking the same position it advances in this case. On February 22, 2016, the panel withdrew its earlier opinion and issued an amended one again holding that subsection (g) contains a freestanding exception to execution immunity. *Bennett v. Islamic Republic of Iran*, 817 F.3d 1131, 1141 (9th Cir. 2016). Judge Benson disagreed with the majority's interpretation of subsection (g) and filed a partial dissent on that issue. *Id.* at 1149-51. The panel expressly invited Bank Melli to file another petition for panel and en banc rehearing. *Id.* at 1136.

Bank Melli did so, and on June 14, 2016, the panel issued a second amended opinion. *See Bennett v. Islamic Republic of Iran*, Nos. 13-15442 & 13-16100, 2016 WL 3257780 (9th Cir., June 14, 2016). The majority reaffirmed its earlier conclusion that "subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies

or instrumentalities." *Id.* at *6. Judge Benson again dissented. *Id.* at *11-14. With this latest decision, the Ninth Circuit appears to be done with the case; the panel's order indicates that no judge requested a vote on Bank Melli's petition for en banc rehearing. *Id.* at *2.

The *Bennett* majority purported to explain away the "as provided in this section" language in subsection (g) by interpreting it to apply only to § 1610(f). *Id.* at *6 ("When subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in § 1610(f)."). That strikes us as a highly strained interpretation. First, as we've already noted, it implausibly reads the word "section" as "*sub*section," so the phrase "as provided in this section" actually means "as provided in *sub*section (f)."

Second, and importantly, § 1610(f) *never became operative.* It was adopted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681, 2681-491 (1998), and pertains to execution on property associated with certain regulated and prohibited financial transactions. Congress originally authorized the President to waive subsection (f)'s provisions "in the interest of national security." *Id.* § 117(d), 112 Stat. at 2681-492. President Clinton immediately issued a blanket waiver. Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). Congress briefly repealed the President's waiver authority in the Victims of Trafficking and Violence Protection Act of

2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1541, 1543, but quickly restored it, *id.* § 2002(f)(1)(B), 114 Stat. at 1543, codifying the Executive's waiver authority in 28 U.S.C. § 1610(f)(3): "The President may waive any provision of paragraph (1) in the interest of national security." President Clinton issued another blanket waiver that same day. Presidential Determination No. 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

So subsection (f), being inoperative from the start, does not allow *any* form of execution. Congress enacted subsection (g) just eight years later. If the Ninth Circuit's reasoning is correct, subsection (g) was effectively a nullity upon passage. That cannot be the correct interpretation. *See Voisine v. United States*, No. 14-10154, 2016 WL 3461559, at *6 (U.S., June 27, 2016) (explaining that Congress is presumed to legislate against the backdrop of the "known state of the laws" (quoting *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 256 (1835))). It therefore makes no sense to say, as the *Bennett* majority does, that the phrase "as provided in this section" in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution "as provided in this section" would mean no execution at all.

For these reasons, we disagree with the Ninth Circuit's interpretation of subsection (g). We note that the *Bennett* majority drew support for its conclusion from our decisions in *Gates* and *Wyatt*, apparently reading them as the plaintiffs do here. *See Bennett*, 2016 WL 3257780, at *7. That's understandable for the reasons we've already explained. To the extent that *Gates* and

Wyatt can be read as holding that § 1610(g) is a free-standing exception to execution immunity for terrorism-related judgments, they are overruled.[6]

To summarize: Section 1610(g) is not itself an exception to execution immunity for terrorism-related judgments; rather, it abrogates the *Bancec* rule for terrorism-related judgments. Accordingly, terrorism victims with unsatisfied § 1605A judgments against foreign states may execute on the foreign state's property *and* the property of its agency or instrumentality – without regard to the *Bancec* presumption of separateness – but they must do so "as provided in this section." § 1610(g). That is, they must satisfy an exception to execution immunity found elsewhere in § 1610 – namely, subsections (a) or (b).

E. The Terrorism Risk Insurance Act

Finally, the plaintiffs argue that the Persepolis Collection is subject to attachment and execution under section 201(a) of TRIA, which permits a person who holds a judgment against a state sponsor of terrorism to execute on the foreign state's assets (and those of certain agencies and instrumentalities) if the assets

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[6] Because this opinion overrules circuit precedent and creates a conflict with the Ninth Circuit, it has been circulated to all judges in active service in accordance with Circuit Rule 40(e). Chief Judge Wood and Circuit Judges Posner, Flaum, Easterbrook, and Rovner did not participate, so a majority did not vote to rehear this case en banc. Circuit Judge Hamilton has filed a dissent from the denial of en banc review, which is attached to this opinion.

have been blocked by executive order under certain international sanctions provisions. Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (2002). An asset is deemed to be blocked when it has been "seized or frozen" by the United States under section 5(b) of the Trading with the Enemy Act or under sections 202 or 203 of the International Emergency Economic Powers Act. *Id.* § 201(d)(2)(A), 116 Stat. at 2339.

In response to the 1979 Iran hostage crisis, President Carter invoked his authority under the International Emergency Economic Powers Act and issued Executive Order 12170, which froze all Iranian assets in the United States. Exec. Order No. 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). The hostage crisis was resolved in 1981 with the Algiers Accords, and in accordance with commitments made in that agreement, President Carter issued Executive Order 12281, which unblocked all uncontested property interests of the Iranian government. Exec. Order No. 12281, 46 Fed. Reg. 7923 (Jan. 19, 1981). The order gave implementing authority to the Treasury Department. *Id.* at 7924. The Treasury Department's Office of Foreign Assets Control issued regulations broadly defining unblocked property as "all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities." 31 C.F.R. § 535.333(a). A property interest is considered "contested only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset," and a belief is considered reasonable "only if it is based on a bona fide opinion, in

writing, of an attorney licensed to practice within the United States stating that Iran does not have title or has only partial title to the asset." *Id.* § 535.333(c).

There's no evidence that the University contests Iran's title to the Persepolis Collection. To the contrary, the University has reaffirmed the terms of the long-term academic loan, which unambiguously requires it to return the artifacts to Iran when study is complete. Nor has the University sought or obtained an attorney's opinion that Iran lacks title or has only partial title to the artifacts.

The plaintiffs argue that the Persepolis Collection remains a blocked asset subject to execution because the University asserted in a June 2004 district-court filing that it maintained a "superseding possessory right." But no one disputes that the University has a present *possessory interest* in the Persepolis Collection. Iran nonetheless retains full *ownership*. The plaintiffs place great emphasis on the fact that Iran has periodically inquired about the progress of the study and has occasionally requested the return of the artifacts. That simply reinforces the University's present possessory interest; it's not evidence of contested title.

Alternatively, the plaintiffs claim that the artifacts have been "reblocked" by President Obama's Executive Order 13599. 77 Fed. Reg. 6659, 6659 (Feb. 8, 2012). But section 4(b) of this order expressly exempts all "property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979, and thereafter

made subject to the transfer directives set forth in Executive Order 12281 of January 19, 1981." *Id.* at 6660.

The plaintiffs argue that "transfer directives" means a directive from Iran, and because Iran has never directed that these particular artifacts be transferred to it, the exception in section 4(b) doesn't apply to the Persepolis Collection. This argument misreads the 2012 order, which refers to "transfer directives set forth in" President Carter's 1981 Executive Order that all property meeting certain specified criteria be returned to Iran. That is, the directive is categorical rather than contingent on a particularized demand by Iran.

Accordingly, the district judge was right to conclude that attachment and execution under section 201 of TRIA is unavailable.

AFFIRMED.

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A True Copy [SEAL]

Teste:

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Deputy Clerk
of the United States
Court of Appeals for the
Seventh Circuit

HAMILTON, *Circuit Judge*, dissenting from denial of en banc review. The panel opinion in *Rubin v. Islamic Republic of Iran*, No. 14-1935, both creates a circuit split and overrules, in part, two recent decisions of this court. Either step by itself would ordinarily trigger our Circuit Rule 40(e), which requires circulation within the court before publication to see if a majority of active judges wish to rehear the case en banc.

In this case, a majority of active judges do not even have the opportunity to vote. A majority are disqualified, so it is impossible to hear this case en banc. In this rare situation, the panel apparently has the *power* to overrule circuit precedent and to create a circuit split without meaningful Rule 40(e) review. Yet that step is a mistake that should not go without comment. Also, most Rule 40(e) decisions settle the legal issue in the circuit. In this rare situation, one panel's decision to overrule another's decisions should not be treated as settling the legal issue in this circuit. I respectfully dissent.

The issue is whether a provision of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1610(g), offers a freestanding basis for executing judgments against state sponsors of terrorism, independent of § 1610(a) and (b). As dry and technical as that sounds, the issue has important practical consequences for victims of state-sponsored terrorism. Most important, the *Rubin* panel's view restricts execution to foreign sovereign assets that are used: (a) by the foreign sovereign itself, (b) for a commercial activity, and (c) in the United States. That reading shelters from execution a

wide range of assets of state sponsors of terrorism, such as the museum collection here.

If, on the other hand, § 1610(g) offers a freestanding basis for execution, then victims are not limited to property the sovereign uses commercially in the United States. Victims of state-sponsored terrorism may execute judgments against a broader range of foreign sovereign assets. That's the view of the Ninth Circuit in *Bennett v. Islamic Republic of Iran*, ___ F.3d ___, ___ & nn. 4-7, 2016 WL 3257780, at *6-7 & nn. 4-7 (9th Cir. 2016), which held that § 1610(g) provides a freestanding basis for executing judgments for state-sponsored terrorism. That reading should enable the plaintiffs in *Bennett* to execute on assets that were not used commercially in the United States. See *id.* at *4 (cash in United States that was owed to Iranian state bank for use of credit cards in Iran). That same reasoning would extend to the museum collection at issue here.

Whether § 1610(g) provides a freestanding basis also affects the procedures that victims of state-sponsored terrorism must follow to execute their judgments. We dealt with procedural issues in both *Wyatt v. Syrian Arab Republic*, 800 F.3d 331, 342-43 (7th Cir. 2015), and *Gates v. Syrian Arab Republic*, 755 F.3d 568, 575-77 (7th Cir. 2014) (alternative holding). In both cases, we adopted the view that § 1610(g) is freestanding, which broadens the rights of victims v. state sponsors of terrorism, while still assuring due process of law.

The details of the textual arguments are laid out well in *Bennett* and *Rubin*, and I will not repeat them. Both readings of the text, I believe, are reasonable, meaning that the text is ambiguous. The courts must choose between two statutory readings: one that favors state sponsors of terrorism, and another that favors the victims of that terrorism.

The FSIA contains detailed protections for foreign governments in most civil litigation. But over the years, Congress has added special provisions for cases of state-sponsored terrorism, including the addition of § 1610(g) as part of § 1083 of Public Law 110-181, the National Defense Authorization Act for Fiscal Year 2008. Those special provisions, including § 1610(g), work together to make it easier for victims of state-sponsored terrorism to pursue foreign sovereign assets in the United States. In 2008, Congress even took the unusual step of applying the new provisions to pending cases. P.L. 110-181, § 1083(c). See also *Bennett*, 2016 WL 3257780, at *8 (legislative history of 2008 amendments shows broad intent to facilitate execution of judgments against *any* property owned by state sponsors of terrorism).

I recognize that "no legislation pursues its purposes at all costs," and that it "frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). But in interpreting an ambiguous statutory text, we can and should draw on statutory purpose and legislative history. We must choose one

side or the other. The balance here should weigh in favor of the reading that favors the victims. We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also undeserving beneficiaries of the unusual steps taken by the *Rubin* panel.

We should continue to follow *Gates* and *Wyatt*, and we should avoid creating a conflict with *Bennett*, especially in a case where the en banc court cannot act. We should allow the *Rubin* plaintiffs to pursue broader categories of Iranian property, including the Persepolis Collection at the University of Chicago.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART E. HERSCH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, TZVI ROSENMAN, Plaintiffs, v. THE ISLAMIC REPUBLIC OF IRAN, THE IRANIAN MINISTRY OF INFORMATION AND SECURITY, AYATOLLAH ALI HOSEINI KHAMENEI, ALI AKBAR HASHEMI-RAFSANJANI, ALI FALLAHIAN-KHUZESTANI Defendants. THE UNIVERSITY OF CHICAGO, THE FIELD MUSEUM OF NATURAL HISTORY, Citation Respondents.	No. 03 C 9370 Judge Robert W. Gettleman

MEMORANDUM OPINION AND ORDER

In this action, plaintiffs seek to attach and execute on numerous ancient Persian artifacts in the possession of the University of Chicago and the Field Museum of Natural History ("the Museums") to satisfy a default judgment entered against the Islamic Republic of Iran ("Iran").[1] Both the Museums and Iran (collectively, "defendants") have moved for summary judgment, asserting that the artifacts are not subject to attachment under any of the statutes cited by plaintiffs. For the reasons described below, the defendants' motions for summary judgment are granted.

BACKGROUND[2]

The facts of this case have been described in previous district court and appellate opinions, *see Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 786 (7th Cir. 2011),[3] and the court will not rehash those facts in detail here. In short, on September 4, 1997, Hamas carried out a horrific triple suicide bombing in Jerusalem

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[1] Jurisdiction for the underlying action was predicated on the exceptions to sovereign immunity detailed in 28 U.S.C. § 1605(a)(7).

[2] The following facts are, unless otherwise specified, undisputed and come from the parties' L.R. 56.1 statements.

[3] In 2011, the Museums appealed two orders by the district judge previously assigned to this case regarding discovery issues and the propriety of the assertion of an affirmative defense. *See Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011). That opinion dealt with these preliminary issues and remanded the case to the district court. The details of the opinion are discussed below.

that killed five individuals and wounded 200. Plaintiffs are American citizens who were either wounded or suffered severe emotional and loss-of-companionship injuries as a result of the attack. Plaintiffs sued Iran in the federal district court in Washington, D.C., alleging that Iran was responsible for the bombings as a result of the training and support it had provided to Hamas, and obtained a $71.5 million default judgment. Plaintiffs now seek to collect on that judgment by attaching alleged assets of Iran located within the United States. The assets relevant to this case are a number of collections of artifacts[4] currently in the possession of the Museums.

The Persepolis and Chogha Mish Collections are in the possession of the University of Chicago. Both belong to the National Museum of Iran and are on long-term loan to the University of Chicago's Oriental Institute ("the Institute") for scholarly study.

The Chogha Mish Collection consists of a small number of clay seal impressions recovered from excavations in Iran in the 1960s. Iran loaned the Chogha Mish Collection to the Institute for the purpose of academic study in the 1960s, and most of the collection was returned in 1970. In 1982, Iran informed the Institute that some items in the collection were missing. The Institute agreed to search for and return any inadvertently retained artifacts. In 1983, Iran filed a

[4] The court uses the terms "artifacts" and "collections" to describe all of the assets collectively. When an argument applies to a subset of those collections, the court will name the collection individually.

claim in the Iran-U.S. Claims Tribunal ("the Tribunal") seeking the return of the missing objects. Since the claim was filed, the Institute has located some of the missing objects, but has not returned those objects due to the citation entered in this case on May 20, 2004.[5]

The Persepolis Collection consists of approximately 30,000 clay tablets and fragments in the possession of the Institute. In 1937, Iran agreed to loan the Persepolis Collection to the Institute to be read and translated. The terms of the agreement allowed the Institute to retain 500 bricks upon completion of the deciphering operation, with the remaining 29,500 bricks to be returned to Iran. Over the years, Iran has made numerous inquiries into the timeline for the return of the bricks. Most recently, in 2004, the Institute entered into an agreement with Iran to return 300 tablets and to deliver the remainder to Iran "gradually and soon."

The Museums allege that the remaining artifacts of Iranian origin are the property of the Museums, while plaintiffs argue that they are the property of Iran. The Herzfeld Collection is a collection of roughly 1,200 prehistoric Persian artifacts purchased by the Field Museum in 1945 from Dr. Ernst Herzfeld, a German archeologist who worked in Persia from 1905 to 1936. The Field Museum purchased the collection in April 1945 for $7,300. The Field Museum subsequently sold part of the collection to the Institute in 1945, but

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[5] On May 20, 2004, plaintiffs issued a Citation to Discover Assets to the Museums. Because those artifacts are the subject of pending litigation, the Institute has not turned them over to Iran.

took back six pieces in December 1946. Plaintiffs allege that Herzfeld is widely believed to have removed antiquities from Iran without the permission of Persian officials, and that he failed to provide evidence of his right to own and possess the items. Because of the lack of provenance of the items, plaintiffs argue that the Herzfeld Collection remains the property of Iran.

The remaining artifacts are small collections that the Museum defendants refer to collectively as "the OI collection."[6] The Institute states these items were acquired through a division of joint excavation finds with

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[6] Plaintiffs separately identify each of the small collections that make up the OI collection, including: the Gremliza Collection, the Adams Collection, the Cooper Collection, "Bronze Bands with Striding Griffins," the Alizadeh Collection, and Accession 3699. The Gremliza Collection came into the possession of the Institute in 1988 from a traveling medical doctor, Dr. Gremliza, who visited Iranian villages in the mid-1960s. Plaintiffs allege that Dr. Gremliza did not lawfully possess or own the items, and that he did not have permission to export them. The "Bronze Bands with Striding Griffins" are four sections of a bronze band that are part of the residual OI collection, and plaintiffs note that there are no records of how the items came into the possession of the Institute. The Adams Collection was acquired through Robert Adams, but plaintiffs assert that Adams did not own the items and that the Institute's evidence as to provenance is insufficient. The Cooper Collection was donated by Dr. Cooper, who found the items while stationed near Persepolis during World War II. Plaintiffs allege that Cooper's ownership of the collection is questionable. The Alizadeh Collection was given to the Institute in 1995 by a staffer, Abbas Alizadeh, who stated that he found them in a former staffer's home. Plaintiffs argue that the Institute has no records as to the ownership or authorizations by the staffer. Accession 3699 is a Persian tile "probably" given to the Institute by Otis Ellery Taylor. Plaintiffs argue that its chain of ownership is unknown.

Iran or as gifts from third parties, and claims that the Institute owns the items. Plaintiffs claim that the items were improperly removed from Iran and remain Iranian property.

Defendants have each moved for summary judgment, arguing that no legal mechanism exists that would permit the attachment of these antiquities. Iran seeks summary judgment with regard to the Persepolis Collection and the Chogha Mish Collection. The Museums seek summary judgment with respect to the Herzfeld Collection and the OI Collection. Specifically, defendants argue that there is no basis for plaintiffs to attach the artifacts under the exceptions to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, or the Terrorism Risk Prevention Act, 28 U.S.C. § 1610 note.

DISCUSSION

I. Standard

A movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unterreiner v. Volkswagen of Am., Inc.*, 8 F.3d 1206, 1209 (7th Cir. 1993). Once a moving party has met its burden, the nonmoving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Becker*

v. Tenenbaum-Hill Assocs., Inc., 914 F.2d 107, 110 (7th Cir. 1990). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *See Green v. Carlson*, 826 F.2d 647, 650 (7th Cir. 1987) ("[W]hen considering the qualified immunity issue on a motion for summary judgment, a district court should consider all of the undisputed evidence in the record, read in the light most favorable to the non-movant."); *Fisher v. Transco Services-Milwaukee Inc.*, 979 F.2d 1239, 1242 (7th Cir. 1992).

A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Stewart v. McGinnis*, 5 F.3d 1031, 1033 (7th Cir. 1993). The nonmoving party must, however, do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson*, 477 U.S. at 252.

II. Foreign Sovereign Immunities Act

Both Iran and the Museums have moved for summary judgment on the ground that plaintiffs may not attach the artifacts under the FSIA. Under the FSIA, all "property in the United States of a foreign state

shall be immune from attachment" unless exempted by an enumerated exception. 28 U.S.C. § 1609. All defendants argue that no exception to the FSIA applies to the collections, and thus no mechanism exists under the FSIA to attach the artifacts.[7] Plaintiffs bear the burden of demonstrating that the property is not immune from attachment. *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011); *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005).

A. Commercial Activity Exception

Plaintiffs argue that one of the enumerated exceptions to the FSIA detailed in Section 1610, the commercial activity exception, allows the attachment of the Persepolis Collection. Section 1610 provides that "[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment. . . ." 28 U.S.C. § 1610(a). Commercial activity is defined in Section 1603(d) as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by

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[7] The Museums argue that the Herzfeld and OI Collections are not the property of a foreign state, and that the FSIA therefore cannot serve as the basis for attachment. Because the question of commercial activity, discussed below, resolves the FSIA question for all the collections, the court need not reach the question of whether the items in the Herzfeld and OI Collections are the property of Iran.

reference to its purpose." Plaintiffs do not argue that Iran used any of the artifacts in a commercial manner to satisfy this exception; rather, plaintiffs contend that the Institute acts as Iran's agent, and therefore any commercial activity on the part of the Institute may properly be attributed to Iran. The parties dispute whether: (1) the commercial use must be conducted solely by the sovereign to subject the artifacts to attachment; (2) whether the Institute may be characterized as Iran's agent and their actions therefore attributed to Iran; and (3) whether the acts performed by the Institute in the course of studying and displaying the artifacts constitute "commercial activity."

Section 1610 does not explicitly restrict the commercial activity exception to activity conducted solely by the sovereign. For this reason, plaintiffs argue that the exemption should not be construed as limited to Iran's activities and may cover actions by the Museums. Plaintiffs note that Section 1605 of the FSIA, which discusses the exceptions to jurisdictional immunity, contains a discussion of how a sovereign's commercial activities may subject it to the jurisdiction of U.S. courts. Subsection (a)(2) of Section 1605 provides that a foreign state will not be immune from jurisdiction in a case "in which the action is based upon a commercial activity carried on in the United States by the foreign state[.]" Because that subsection explicitly provides that the commercial activity must be carried on by the foreign state, plaintiffs argue that the drafters of the FSIA could have included that same explicit language in Section 1610, but chose not to do so.

Therefore, as a matter of statutory construction, plaintiffs argue that the drafters must have intended not to restrict Section 1610 to activities carried on solely by the foreign state.

The court disagrees with plaintiffs' interpretation of the statute. First, Section 1603 defines a number of terms used throughout the FSIA. In Section 1603, a "commercial activity carried on in the United States by a foreign state" is defined as "commercial activity carried on by such state and having substantial contact with the United States." The defined term, therefore, does not simply refer to actions conducted only by the foreign nation, but contains the additional clause requiring that activity to have substantial contacts with the United States. The defined term does not require that the commercial activity actually take place within the borders of the United States, but rather that the activity have substantial contacts with the United States. In contrast, the language of Section 1610 provides that the property must be "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). An equally reasonable explanation for Congress' decision not to use the defined phrase in Section 1610 is to avoid expanding that Section to property used for a commercial activity having substantial contact with the United States. The drafters' exclusion of the phrase "carried on in the United States by a foreign state" is therefore not dispositive of an intention to broaden the scope of Section 1610 to actions conducted by other entities.

Further, Section 1602 of the FSIA articulates Congress' declaration of purpose in passing the Act. It states that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. A plain reading of that subsection demonstrates that it is the sovereign's commercial activities that subject the property to attachment.

Various courts have also examined the legislative history of the FSIA and determined that Congress intended Section 1610 to be limited to acts of the sovereign. *See Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 234 (D.Mass. 2006) (holding that the plain language, legislative history, and prevailing principles of international law compel the conclusion that the exception in Section 1610 should be interpreted to apply only where the sovereign itself conducts the activity); *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 251-60 (5th Cir. 2002) (applying the principles of international law to the FSIA); *DeLetelier v. Republic of Chile*, 748 F.2d 790, 795-98 (2d Cir. 1984) (holding that FSIA's exceptions for executional immunity are narrower than its exceptions for jurisdictional immunity); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 21-24 (D.D.C. 1999) (holding that the Supreme Court's analysis of the FSIA in *Republic of Argentina v. Weltover*, 504 U.S. 607, 611-14 (1992), compels the conclusion that Congress intended

Section 1610 to apply to the actions of the sovereign). This court agrees with the district courts that have interpreted Section 1610 to require action on the part of the sovereign for the commercial use exception to apply.

Plaintiffs further argue that a foreign state cannot conduct commercial activities on its own and must act through agents. With respect to the Persepolis Collection,[8] plaintiffs argue that the Institute is Iran's agent because the Institute has a fiduciary relationship with Iran and serves as bailee of Iran's property. As evidence of this alleged agency relationship, plaintiffs point to Iran's "working relationship" with the Institute, and equates that relationship to a fiduciary relationship. Plaintiffs also reference filings in this case where Iran has admitted to a bailor-bailee relationship with the Institute, and equate that relationship with an agency relationship. Plaintiffs argue that an agency relationship exists because the Institute must account to Iran for its activities, and that Iran has the right to exercise control over the Institute with regard to the artifacts.

Under Illinois law, a "principal-agent relationship is a legal concept founded upon a consensual and fiduciary relationship between two parties." *Knapp v. Hill*, 276 Ill. App. 3d 376, 380, 657 N.E.2d 1068, 1071 (1st

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[8] Plaintiffs have abandoned their FSIA argument regarding the Chogha Mish Collection and do not argue that the commercial activity exception applies to the Museum Collections; therefore, the court will discuss only the Persepolis Collection.

Dist. 1995). The central question is "whether the principal had the right to control the activities of the agent." *Id.* Agents also owe duties of good faith, fidelity, and loyalty to the principal. *ABC Trans Nat. Transport, Inc. v. Aeronautics Forwarders, Inc.*, 62 Ill. App. 3d 671, 20 Ill. Dec. 160, 379 N.E.2d 1228 (1st Dist. 1978).

Although the Institute and Iran have a "working relationship," the record does not demonstrate that the relationship is an agency relationship such that Iran controls the Institute. The relationship between the parties regarding the Persepolis Collection is set forth in a loan agreement between Iran and the Institute, and the terms of the relationship are governed by that agreement. Under the agreement, the Institute has possession of the Collection for the purposes of study and translation, and is obligated to return the Collection once it completes its studies. This relationship is not the equivalent of an agency relationship because Iran (the alleged principal) cannot control the activities of the Institute (the alleged agent) other than to obtain possession of the Collection when the Institute, in its judgment, is finished with its studies. The relationship is therefore more a bailment than an agency.

"Under Illinois law, bailment is the delivery of goods for some purpose, upon a contract, express or implied, that after the purpose has been fulfilled the goods shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept till he reclaims them." *In re Mississippi Valley Livestock, Inc.*, ___ F.3d ___, 2014 WL 949969 (7th Cir. Mar. 12, 2014) (internal quotations and citations omitted). But

a bailment is not equivalent to an agency relationship. Plaintiffs cite *In Re Couthamel Potato Chip Co.*, 6 B.R. 501, 507 (Bkr. E.D.Pa. 1980), wherein the bankruptcy court stated that bailment is a "true agency relationship." However, in the very next paragraph of that opinion, the court goes on to discuss the distinct definitions of a bailment and an agency, noting that they are not one and the same, but similar. *Id.* Indeed, although a bailee may be an agent of a bailor in certain circumstances, not every bailee is an agent. *See Lionberger v. United States*, 371 F.2d 831, 840 (Ct. Cl. 1967). Because a bailment relationship by itself does not give the bailor control of the bailee, the concepts and relationship are different than an agency. *Id.* (Noting that "[w]here the one who acts in another's behalf is not at the same time also subject to his control, then the relationship, though otherwise a bailment, is not also an agency."). The record does not demonstrate that the Institute had any duties above and beyond the responsibilities articulated in the agreement with Iran, or that Iran directed the activities of the Institute such that the bailee relationship was elevated to an agency relationship.

It should also be noted that the Institute is conducting this academic study for its own research purposes, and not for Iran's benefit. Under the agreement, the Institute consented to provide to Iran "two copies of each of the works, review articles, collections of photographs or drawings it publishes based on the facts made known or the objects found during the work" at the Persepolis excavation, but the letter memorializing

the agreement does not place further burdens or substantial conditions on the Institute.[9] There is no indication in the record that the Institute ever claimed more than a present possessory interest in the collection, or manifested anything other than an intention to work in its own interest. Plaintiffs' claim that the Institute is controlled by Iran are therefore unconvincing.

Because Section 1610 requires the commercial activity to be conducted by the sovereign, and there is no evidence that the Institute may properly be considered an agent of Iran, the court finds that the assets are not subject to attachment under Section 1610 of the FSIA.[10]

B. Section 1610(g)

In 2008, Congress passed the National Defense Authorization Act ("NDAA"), Pub. L. No. 110-181, which, among other things, amended 28 U.S.C. § 1610 to add subsection (g). That section provides that:

> (1) In general. – Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A,

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[9] The record also includes letters from the Institute to Iran wherein the Institute promises to "a full account of our activities in behalf of [Iran]," and other assurances, but these documents do not grant Iran the power to direct the work of the Museums.

[10] Because the court finds that the commercial activity must be conducted by the sovereign, it need not reach the issue of whether the Museums' activities may be characterized as commercial activity.

> and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Plaintiffs argue that the passage of this provision allows the execution against all terror states' assets, regardless of whether they are blocked assets. Plaintiffs rely heavily on *In re Islamic Republic of Iran Terrorism Litigation*, 659 F.Supp.2d 31, 62 (D.D.C. 2009) ("*In re Terrorism Litigation*"), in which Chief Judge Lamberth stated that the NDAA added "new provisions that are plainly intended to limit the application of foreign sovereign immunity."

Defendants argue that plaintiffs did not raise the applicability of Section 1610(g) in the previous appeal of this case to the Seventh Circuit, and are therefore precluded from arguing its applicability on summary judgement because of the mandate rule. They further argue that Section 1610(g) is not an independent exception to immunity, but rather was intended to aid in the execution against property regardless of whether the property belongs to a foreign sovereign or an agent or instrumentality of the sovereign. According to defendants, Congress passed this amendment to Section 1610 to counter the Supreme Court's ruling in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627-28 (1983) ("*Bancec*"), which held that the separate juridical status of a foreign state's instrumentalities and agencies should be respected, and those entities should be accorded a presumption of independent status.

The mandate rule dictates that "any issue that could have been but was not raised on appeal is waived and thus not remanded." *United States v. Chaidez*, 2013 WL 3819658, at *3 (N.D. Ill. July 22, 2013). In 2009, Iran appealed two discovery-related orders by the district judge previously assigned to this case. The first order found that "the immunity codified in § 1609 is an affirmative defense personal to the foreign sovereign and must be specially pleaded[;]" the second order allowed discovery regarding all Iranian-owned assets located in the United States. *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011). Defendants argue that plaintiffs should have raised the

application of Section 1610(g) before the Seventh Circuit in that appeal when arguing that Iran's assets were not immune from attachment and that plaintiffs were therefore entitled to general asset discovery.

The court concludes that the mandate rule does not preclude plaintiffs from arguing the applicability of Section 1610(g). The Seventh Circuit's previous decision dealt narrowly with discovery-related issues and made no findings about whether any assets would be subject to attachment. At this early stage of the proceedings, the Seventh Circuit discussed the issue of "discovery in the context of attachment proceedings against foreign-state property in the United States under the FSIA," noting that courts must "proceed narrowly, in a manner that respects the statutory presumption of immunity." *Id.* at 796. The court made no specific findings about the potential basis for immunity or any exceptions that would limit plaintiffs' Section 1610(g) argument at this juncture.

However, plaintiffs' Section 1610(g) argument nonetheless fails. First, if Section 1610(g) provided a separate basis for attachment that allowed the execution against all terror states' assets, regardless of whether they are blocked assets, certain subsections of Section 1610 would be unnecessary. Subsection (a)(7) provides that when "the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)," the property of the foreign state used for a commercial activity is not immune from attachment "regardless of whether the property is or was involved with the act upon which the claim is

based." Similarly, subsection (b)(3) provides the same for agencies and instrumentalities of the foreign state. Essentially, under those subsections, plaintiffs who obtain judgments under Section 1605A may invoke the commercial activity exception. If Section 1610(g) simply allowed the attachment of all property whether used for commercial activity or not, then subsections (a)(7) and (b)(3) would be inconsistent, because they require a relation to commercial activity. It is the court's duty "to give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (internal quotations and citations omitted). Plaintiffs' interpretation of Section 1610(g) is therefore inconsistent with that cannon of statutory interpretation. Additionally, plaintiffs have virtually no support for their contention that Section 1610(g) expands the bases for attachment. As the court noted in *In re Terrorism Litigation*, upon which plaintiffs rely heavily, acknowledge that the "implications of § 1610(g) are far from clear." 659 F.Supp.2d at 62.

The new subsection includes the key phrase that "the property of a foreign state . . . and the property of an agency or instrumentality of such a state . . . is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*." 28 U.S.C. § 1610(g) (emphasis added). The plain language indicates that Section 1610(g) is not a separate basis of attachment, but rather qualifies the previous subsections. In light of this reading, defendants' argument that Section 1610(g) was enacted to supercede *Bancec* is consistent with the construction of the statute. As

the United States points out in its Statement of Interest, subsections (A) through (E) of Section 1610(g) mirror the factors suggested in *Bancec* as determinative of whether an instrumentality of a foreign government functions as an alter ego of that government. *See Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1381 (5th Cir. 1992). As other courts have held, the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered. *See Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 442 (D.D.C. 2012) *aff'd sub nom. Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013).

The court therefore finds that Section 1610(g) does not provide a new basis for plaintiffs to attach the assets of Iran, and does not subject the collections in question to attachment and execution.

III. Attachment under the Terrorism Risk Insurance Act

Plaintiffs claim that Section 201 of the Terrorism Risk Insurance Act ("TRIA"), 28 U.S.C. § 1610 note, permits the attachment of all the Iranian artifacts in question. Section 201 provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], in every case in which a person has obtained a judgment against a terrorist party

> on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Plaintiffs argue that Iran is a "terrorist party" as defined in TRIA, and that plaintiffs obtained a judgment on a claim for which Iran was not immune under 28 U.S.C.§ 1605(a)(7). Plaintiffs further argue that the artifacts in question are "blocked assets" under TRIA, and therefore subject to attachment. Defendants dispute that the artifacts are "blocked assets."

Section 201(d)(2)(A) defines a "blocked asset" as any asset "seized or frozen by the United States under section 5(b) of the Trading with the Enemy Act or under sections 202 and 203 of the International Emergency Economic Powers Act." In 1979, President Carter's Executive Order 12170 ("EO 12170") froze all Iranian assets in the United States, including the collections in question. Defendants argue that the Algiers Accords[11]

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[11] The Algiers Accords, 20 I.L.M. 224, was an agreement between the U.S. and Iran signed on January 19, 1981. Under the Accords, "the United States agreed to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979," *ibid.*, and (with some exceptions) to "arrange, subject to the provisions of U.S. law applicable prior to November 14,

and the subsequent executive orders that implemented the Accords, including Executive Order 12281, 46 Fed. Reg. 7.923 (Jan. 19, 1981) ("EO 12281"), then unblocked the assets and that the assets remain unblocked. Plaintiffs contend that neither EO 12281 or the Accord unblocked the assets.

EO 12281 mandated that "[a]ll persons subject to the jurisdiction of the United States in possession or control of properties . . . owned by Iran . . . transfer such properties[ ] as directed . . . by the Government of Iran." 1-101. EO 12281 and Algiers Accords unblocked most Iranian assets that existed in the U.S. at the time. See *Weinstein v. Islamic Rep. Of Iran*, 609 F.3d 43, 55 (2d Cir. 2010). Under Treasury Department regulations, some exceptions to EO 12281 allowed certain Iranian assets to remain blocked. The Treasury Department regulation defines the properties unblocked by EO 12281 as "all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities." 31 C.F.R. § 535.333(a). That regulation further states that a property interest is "contested only if the holder thereof reasonably believes that Iran does not

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1979, for the transfer to Iran of all Iranian properties," *id.*, at 227. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 370, 129 S. Ct. 1732, 1736, 173 L. Ed. 2d 511 (2009) (internal quotations and citations omitted). Subsequent to the signing of the Accords, President Regan lifted legal prohibitions against transactions involving Iranian property. *See* Exec. Orders Nos. 12277-12282, 3 CFR 105-113 (1981 Comp.); 31 CFR §§ 535.211-535.215 (1981).

have title or has only partial title to the asset." 31 C.F.R. § 535.333(c).

Because different facts apply to the ownership of each of the collections, and thus the "blocked" or "unblocked" status of the artifacts, the court will address them separately.

A. The Persepolis Collection and the Chogha Mish Collection

In their briefs, both Iran and the Institute agree that the Persepolis Collection and the Chogha Mish collection ultimately belong to Iran. Plaintiffs argue that the history of the Persepolis Collection has long been disputed, and that in a previous filing defendants had characterized Iran's interest in the objects as a "reversionary interest" only. According to plaintiffs, this characterization demonstrates a contest as to ownership, despite defendants' claims. Further, because Iran filed a claim in the Iran-U.S. Claims Tribunal against the United States in 1983 regarding the objects missing from the Chogha Mish Collection, plaintiffs argue that ownership of that collection is also disputed.

Regarding the Persepolis Collection, the filing that plaintiffs cite containing the language about the reversionary interest is a motion for a protective order filed by the University of Chicago and the Institute in June 2004 in the instant case. Although the motion does state that the National Museum of Iran "has only a reversionary interest[,]" the motion goes on to explain that this reversionary interest is a "right to ultimate

ownership and return." Plaintiffs attempt to argue that a reversionary interest leaves a party with only a portion of the title of the object, but they cite no cases demonstrating that granting a current possessory interest to the Museums divests Iran of its title. The Museums' assertion of a possessory interest is not equivalent to a claim that Iran does not own the collections. The terms of the academic loan require the Institute to return that collection to Iran after the academic study is complete. Thus, plaintiffs' argument that the Museums have disputed the ownership of the Persepolis Collection is without merit.

Regarding the Chogha Mish collection, defendants claim that there is no dispute as to the ownership of the collection. As an initial matter, the proceedings in the Tribunal are not between Iran and the Museums, but are instead between the United States and Iran. Any conflict between those parties does not presume an objection on the part of the possessing museum. As the government points out in its Statement of Interest, the Treasury department regulations implementing the Algiers Accords make it clear that for an asset to be "contested," the contest must be between Iran and the property holder. *See also Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 56-58 (1st Cir. 2013). Further, the record confirms that ownership of the collection is not one of the issues in the claim before the Iran-U.S. Claims Tribunal. Iran's claim before the Tribunal focuses on returning the objects that were not turned over in 1970 with the rest of the collection. Ownership of the collection is not disputed, and therefore, the objects are not "blocked" assets under TRIA.

Plaintiffs further argue that Executive Order No. 13,599, 77 Fed. Reg. 6,659 (Feb. 5, 2012) ("EO 13,599") made the collections "blocked assets." EO 13,599, however, does "not apply to property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979, and thereafter made subject to the transfer directives set forth in Executive Order 12281 of January 19, 1981, and implementing regulations thereunder." *Id.* at 6,660. Because this court has already found that the assets were blocked under EO 12170 and unblocked under EO12281, EO 13,599 does not apply to the collections and does not render the assets "blocked" under TRIA.

Because the assets in question are not "blocked" under TRIA, they are not subject to attachment by the plaintiffs under that statute.

B. The Museum Collections

The Museums argue that the Museum Collections are not subject to attachment under TRIA because the Museum Collections are not the assets of Iran and are not "blocked" assets. Regarding the second point, the Museums rely on EO 12281, the Order that unblocked "all uncontested and non-contingent liabilities and property interests" of Iran. As noted above, property is contested "only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset." 31 C.F.R. 535.333(c). The Museums assert that Iran does not have title to the assets, but

they cite the First Circuit's opinion in *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 57-58 (1st Cir. 1013 [sic]), for the proposition that an asset cannot be considered blocked under TRIA unless Iran itself asserts a claim of ownership over it. The Museums argue that Iran has never asserted ownership of the Museum Collections, and therefore those collections are unblocked assets not subject to attachment.

Plaintiffs argue that the Museum Collections were not unblocked by EO 12281 because the artifacts were contested at the time of the order. According to plaintiffs, the lack of evidence of provenance demonstrates Iran's ownership interest in the antiquities, and ownership of the antiquities is contested. Further, plaintiffs state that Iran "always contests ownership of items taken without permission."

The record does not demonstrate that Iran has asserted any claim of ownership over the Museum Collections, despite plaintiffs' broad statement that Iran "always contests" the ownership of its antiquities removed from the country. Plaintiffs support this argument with a number of cases before British courts wherein Iran contested the removal of artifacts that it alleged had been improperly removed.[12] These cases

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[12] For example, plaintiffs cite a letter from a British law firm on behalf of Iran to a London gallery regarding a number of items that the London gallery had advertised for sale. The letter states that those items were considered of historical interest, and as such, proper authorization was required before those items could be removed. The letter further states that it is the position of the law firm that ownership of those items remained with Iran.

and submissions do not, however, indicate that Iran has offered any claim of ownership over the Museum Collections at issue here. As a result, the record does not support plaintiff's argument that Iran has disputed the ownership of these particular collections.

Although plaintiffs correctly argue that the First Circuit's decision in *Rubin v. Islamic Republic of Iran*, 709 F.3d 49 (1st Cir. 2013), is not controlling, it is well-reasoned and persuasive. The First Circuit considered the submission of the United States Department of the Treasury's Office of Foreign Assets Control (OFAC), which cited and interpreted the language of EO 12281 and the Treasury regulations. Those regulations required a transfer of properties only "as directed . . . by the Government of Iran." 46 Fed.Reg. at 7,923; 31 C.F.R. § 535.215(a). OFAC argued that this language applied to the rest of the regulations regarding the transfer of assets such that Iran must actively direct the transfer of an asset or assert ownership in order to render an asset contested. The First Circuit deferred to OFAC's interpretation of the regulations, finding that "an asset can be 'contested' for purposes of 31 C.F.R. § 535.333 only if Iran itself has claimed an interest in the asset." *Rubin v. Islamic Republic of Iran*, 709 F.3d at 57-58.

The court finds the reasoning of the First Circuit and the interpretation by OFAC compelling.[13] The language cited by OFAC demonstrates that EO 12281 and

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[13] Plaintiffs urge the court not to rely on OFAC's interpretation because the U.S. is a litigant in any case interpreting

Treasury's implementing regulations intended that only assets contested by Iran, and not by third parties such as judgment creditors, would remain blocked and therefore subject to attachment. The court therefore holds that Iran itself must contest the ownership of the property in order to render an asset contested, and therefore blocked, under the TRIA. Because Iran has not claimed ownership of the antiquities in the Herzfeld Collection or the OI Collection, those assets are not contested or blocked, and therefore are not subject to attachment under TRIA.[14]

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the TRIA, and because an agency's interpretation should only be used when the regulation is ambiguous. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880, 178 L. Ed. 2d 716 (2011). Both parties' readings of the regulation are plausible and the court must therefore turn to the agency's interpretation of the regulation for guidance, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* (internal citations and quotation marks omitted). Plaintiffs further argue that courts should not defer to the position [sic] the U.S. when that position is announced during litigation in which the U.S. is participating. However, as the First Circuit noted, "[t]he fact that blocked assets play an important role in the conduct of United States foreign policy may provide a further reason for deference to the views of the executive branch in this case." *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 57 (1st Cir. 2013) (citing *Rep. of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004), and *Estate of Heiser v. Islamic Rep. of Iran*, 885 F.Supp.2d 429, 440-41 (D.D.C. 2012).

[14] In support of their argument that TRIA and the FSIA are applicable to the Herzfeld and OI Collections, plaintiffs contend that Iran owns the artifacts, not the Museums. Because the court has found that even if the artifacts were owned by Iran, the commercial activities exception would not apply and the artifacts do not qualify as "blocked" assets, it is unnecessary for the court to reach the question of ownership.

CONCLUSION

The court recognizes the tragic circumstances that gave rise to the instant action, but finds that the law cited by plaintiffs does not offer the remedy they seek.

For the foregoing reasons, none of the statutes cited by plaintiffs provide a basis for the attachment and execution against any of the artifacts in the Persepolis, Chogha Mish, Herzfeld, or OI Collections. Consequently, the court grants defendants' motions for summary judgment.

ENTER: March 27, 2014

/s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

RELEVANT STATUTORY PROVISIONS

1. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1602 *et seq.*, provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that

property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state

with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That –

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of

arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any

proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed.

(g) LIMITATION ON DISCOVERY. –

(1) IN GENERAL. – (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay

discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET. – (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL. –

(1) NO IMMUNITY. – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD. – The court shall hear a claim under this section if –

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1)

occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred –

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS. – An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of –

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION. – A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to –

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES. – After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS. –

(1) IN GENERAL. – The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS. – The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of

Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL. – In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION. –

(1) IN GENERAL. – In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is –

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE. – A notice of pending action pursuant to this section shall be filed by the clerk of

the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY. – Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS. – For purposes of this section –

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371),

section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not

be accorded immunity with respect to any counterclaim –

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a

signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United

States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made –

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used

for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of

automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of

this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or

may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(c) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries –

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER. – The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS. –

(1) IN GENERAL. – Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to

attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE. – Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS. – Nothing in this subsection shall be construed to

supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if –

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or

government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.